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CASE NO. 82-815

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of the Bankruptcy Reform Act of 1978, 11 U.S.C. Section 362(b) (5), exempt from the automatic stay provision of 11 U.S.C. Section 362(a) state court proceedings which are intended to enforce a debtor's compliance with a mandatory injunction obtained in an action against the debtor to vindicate the state's police power authority to abate a public health hazard.

2. Whether a state court proceeding to enforce a mandatory injunction requiring the cleanup of a chemical waste storage facility and an order appointing a receiver to perform the cleanup which was necessitated due to the debtor's failure to comply with the injunction is a proceeding to enforce a money judgment or a proceeding to enforce an injunction within the meaning of 11 U.S.C. Section 362(b) (5).

3. Whether the State of Ohio is estopped to deny that the State is not seeking to enforce a money judgment.

PARTIES TO THE PROCEEDING BELOW

The petition to this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is sought by the State of Ohio on the relation of its Attorney General, William J. Brown. The State was a party to a proceeding before the Bankruptcy Court for the Southern District of Ohio which court issued a statutory stay against Ohio preventing it from going forward with a proceeding in a state trial court. The State was the appellant in the proceeding in the Sixth Circuit. William Lee Kovacs, d/b/a, B & W Enterprises, Hamilton Industrial Real Estate Company, Resort Rentals and Whitco Enterprises, (hereinafter "Kovacs" or "Debtor") is the debtor in the bankruptcy case, the moving party for the issuance of the statutory stay which is at issue in this case, and appellee in the Sixth Circuit proceeding. Jack Zettler is the receiver appointed in the state court proceeding which was stayed by the bankruptcy court and was a witness before the bankruptcy court. E. Hanlin Bavely is the bankruptcy trustee. Neither Bavely nor Zettler have filed any pleadings in appeals from the bankruptcy court's issuance of the stay although Zettler has orally indicated his concurrence with the State of Ohio's position.

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OPINIONS BELOW

The opinion of the Sixth Circuit in *State of Ohio v. Kovacs,* is reported at 681 F.2d 454 (6th Cir. 1982) and is set out for the Court's convenience in Appendix A. The decisions of the district court and bankruptcy court are not reported, but are set forth in Appendices C and D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1982. The State of Ohio, however, filed a timely petition for rehearing and suggestion for *en banc* consideration. The motion was denied on August 16, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation of the statutory stay provisions of the Bankruptcy Reform Act of 1978, 11 U.S.C. Section 362, and the determination of the extent to which a suit brought by the State of Ohio in state court in the exercise of the State's police power is exempted from the application of the stay. The relevant provisions of the Bankruptcy Act of 1978 are set forth in Appendix H.

STATEMENT OF THE CASE

On September 29, 1976, the State of Ohio, on the relation of its Attorney General, Director of Environmental Protection, and Department of Natural Resources, filed suit in the Butler County, Ohio, Court of Common Pleas, Case No. CV76-09-0834, against, among others, the Chem-Dyne Corporation and William Lee Kovacs, individually and as an officer of Chem-Dyne, alleging, *inter alia,* that defendants had caused the unlawful discharge of toxic water pollutants, i.e., the pesticides Endrin, Dieldrin and Heptachlor into the waters of the state in violation of Chapter 6111 of the Ohio Revised Code; that the defendants had caused an air pollution nuisance in violation of Chapter 3767 of the Ohio Revised Code; and that the defendants' illegal water pollution had caused the death of numerous wild animals, including fish. The Chem-Dyne Corporation was an industrial and chemical waste treatment, recycle, storage and disposal company located at 500 Ford Boulevard in the middle of the City of Hamilton, Butler County, Ohio. William Lee Kovacs was one of the two principal corporate officers of the company and was named as a defendant both as an officer of the corporation and individually because the State contended that many of the unlawful acts were committed at his direction and in his presence.

On July 18, 1979, after more than two (2) years of negotiation, a Stipulation and Judgment Entry was entered in the case. (The Stipulation and Judgment Entry is included as Appendix G.) Kovacs personally signed the Stipulation and Judgment Entry. In that Stipulation and Judgment Entry, the State of Ohio alleged that the defendants had caused water pollution, nuisance conditions and fish kills in violation of Chapters 6111, 3767 and 1531 of the Ohio Revised Code. Finding No. 1 of the Stipulation established that defendants were in the business of hauling, recycling and redistributing

hazardous industrial waste. The Stipulation and Judgment Entry contained a Finding No. 7 that the defendants had industrial wastes and other types of wastes stored on their premises at 500 Ford Boulevard, Hamilton, Ohio, in the amount of 850,000 gallons in liquid form and 4,000 barrels of solid or semi-solid sludges. In Orders 1 and 2 of the Judgment Entry defendants were enjoined to abate water pollution and nuisance conditions at 500 Ford Boulevard. In Order No. 3 the defendants were ordered to remove all the industrial and other wastes described in Finding No. 7 from the premises at Ford Boulevard within 12 months. In Order No. 8, the defendants were directed to pay $75,000 to the Ohio Department of Natural Resources as compensation for the alleged fish kills.*

On February 1, 1980, in a written opinion, Judge Robert L. Marrs, Butler County Court of Common Pleas, granted the State's motion to have a receivership imposed over the defendants. (The Court's decision is included as Appendix F.) In granting the State's motion the court specifically found that the defendants had failed to remove the industrial and hazardous wastes stored in Hamilton as required by Order No. 3 of the Stipulation and Judgment Entry. The court specifically noted that the defendants had operated in "flagrant disregard of the Stipulation and Judgment Decree." (App. F at 41):

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*That part of the order imposing a $75,000 money judgment to Ohio DNR is not at issue in this appeal. The State recognizes this as a money judgment which is dischargeable in bankruptcy. DNR has therefore filed its proof of claim and is using the remedies provided in the Bankruptcy Code to satisfy its money judgment. This appeal deals strictly with the bankruptcy court's determination concerning the effect of the automatic stay contained in 11 U.S.C. Section 362 on Ohio's ability to enforce the injunctions contained in Orders 1, 2, and 3 of the July 18, 1979, Stipulation and Judgment Entry.

> Defendants in this case are engaged in a business that definitely affects this entire community and conceivably the water for this entire area as well as the wild life, natural resources of the area, and the fish in the streams. Mr. Kovacs is engaged in businesses that very definitely have a wide spread effect on the community life and its daily operation and is affected with a public interest which invokes the equity powers of the Court.
> (App. F at 42).

On February 4, 1980, the court entered an order appointing Jack Zettler as receiver and directing the defendants, including Kovacs, to turn over their assets to the receiver for use by the receiver in fulfilling the cleanup obligations imposed upon the defendant in the July 18, 1979 Stipulation and Judgment Entry. (The Order appointing Receiver is included as Appendix E.) *The order also contained an injunction imposing upon Kovacs a continuing duty to cooperate with the receiver to complete the removal of wastes.*

On July 17, 1980, Kovacs filed a petition for reorganization pursuant to Chapter XI of the Bankruptcy Code, 11 U.S.C. Section 101, *et seq.*, and sought an automatic stay pursuant to 11 U.S.C. Section 362 against the state court receiver, Mr. Zettler. On July 28, 1980, the bankruptcy court dissolved the stay against the receiver because the state receivership was determined to be exempt from the stay pursuant to 11 U.S.C. Section 362(b) (4). Subsequently Kovacs converted to straight bankruptcy pursuant to Chapter VII.

On September 12, 1980, the State moved the Butler County Court of Common Pleas to hold a hearing to determine whether Debtor Kovacs had additional assets which, pursuant to the court's order of February 4, 1980,

should be administered by the receiver and used to complete the cleanup. Specifically, the State alleged that while the cleanup under the receiver's direction was ongoing, there was a need for additional assets to complete the removal and lawful disposal of the waste materials which remained on-site. Since Kovacs had obtained employment elsewhere after the appointment of the receiver, the State asked for the hearing before the common pleas court judge to determine if Kovacs, pursuant to the injunction establishing his continuing duty to cooperate with the receiver, should be required to provide additional financial assistance to complete the removal of wastes from the site.

On September 19, 1980, Debtor Kovacs filed in the bankruptcy court a Motion for a Specific Stay seeking a determination that the statutory stay contained in 11 U.S.C. Section 362 applied against the hearing in the Butler County Court of Common Pleas requested by Ohio on September 12. A hearing on the motion was held before the Bankruptcy Court on September 29, 1980. At the hearing the State presented the expert testimony of Frank Byros of U.S. EPA and Ken Harsh of Ohio EPA. Byros testified concerning the various environmental hazards he encountered at the Ford Boulevard site: (1) fire hazards from flammable chemicals; (2) odors and irritated throats from the air pollution caused by vapors from the chemicals on-site; and (3) ground and surface water pollution caused by the leaking barrels and open pits of toxic chemicals. He testified that the site was an imminent hazard and that the problems would be aggravated by any delay in the cleanup. Harsh also testified concerning the types of dangerous chemicals stored on the site and expressed his opinion that any delay in the cleanup would aggravate the problem. Mr. Zettler, the receiver, testified concerning the need for additional funds in the receivership without which the cleanup would be delayed thereby confirming the fears of Byros and Harsh. Zettler also explained how those funds would be used in the cleanup.

A temporary stay was issued on October 1, 1980, which was to remain in effect until the judge decided the motion for a stay. On October 31, 1980, the bankruptcy court entered its decision and order holding 11 U.S.C. Section 362 applicable and thereby granting Debtor's motion and making permanent the stay contained in 11 U.S.C. Section 362. (The decision is contained in Appendix D). Specifically, the bankruptcy court held that while the State's mandatory injunction was clearly injunctive relief, not a money judgment, since there was no difference in effect upon Kovacs between the expenditure of funds pursuant to a mandatory injunction and a money judgment, Ohio was "estopped to deny" that it was not seeking a money judgment. (App. D at 21). Upon appeal by the State, the decision was affirmed in the United States District Court for the Southern District of Ohio (Appendix C) and by the Sixth Circuit. It is from the Sixth Circuit's decision that the State of Ohio brings its petition to this Court for a writ of certiorari to the Court of Appeals.

REASONS FOR GRANTING THE PETITION

This case presents a question of profound importance to the federal, state and local governments which are attempting to protect citizens from the dangers presented to their health and safety by illegally operated chemical waste disposal facilities. More specifically, this case presents a classic confrontation between the rights of an allegedly impecunious operator of a chemical waste storage facility, William Lee Kovacs, who seeks the shelter of the Bankruptcy Reform Act of 1978 to protect him from his obligation to clean up the environmental nightmare he created, and the rights of the State of Ohio to enforce an injunction obtained against Kovacs prior to his bankruptcy petition which injunction required Kovacs to abate water pollution and nuisance conditions and to

remove all chemical and industrial wastes from the premises before they caused serious harm to the public health and safety. The decisions of the bankruptcy court, district court and court of appeals below focus solely on the effect of Ohio's enforcement efforts on Debtor Kovacs and demonstrate no concern for the threat to public health and safety which is presented by the hazardous materials stored on the Chem-Dyne site. Contrary to the decision below, the legislative history of the Bankruptcy Reform Act of 1978 and the decisions of other federal courts recognize that the rights of a debtor must be carefully balanced against the public health and safety and that in the event of a conflict, public health and safety must prevail. Thus, Ohio seeks to have this Court reverse the decision of the court of appeals which gives priority to a debtor's financial interest over the health and safety of the public. The State presents three grounds in support of its petition for certiorari.

I. The Decision Below Involves An Important Question Of Federal Law, Whether A Bankruptcy Court, To Protect Debtors, May Prevent A State From Exercising Its Police Power To Pursue Enforcement Of An Injunction To Abate A Public Health Hazard.

Throughout the development of federal bankruptcy law there has been a constant tension between the administration of federal bankruptcy proceedings and the enforcement of the states' police power. There has been a temptation for debtors to attempt to use the shelter of the bankruptcy courts to avoid fulfilling their responsibilities under regulatory programs enacted pursuant to state police power. As early as 1939, however, this Court

admonished in, *Palmer v. Commonwealth of Massachusetts,* 308 U.S. 79 (1939), that a bankruptcy proceeding cannot be used to excuse noncompliance with state regulatory programs or to displace the policy judgments of state administrative agencies. Similarly, in *Callaway v. Benton,* 336 U.S. 132, 141 (1949), this Court declared that:

> We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded.

Indeed, the problem is so serious that it was specifically addressed by Congress in the Bankruptcy Reform Act of 1978. Congress was concerned that bankruptcy courts not use their authority to disrupt the enforcement of statutes adopted pursuant to the states' police power to protect public health and safety. This concern was particularly evident in the Congressional committee reports which discussed the automatic stay provisions ultimately contained in 11 U.S.C. Section 362:

> Under present law, there has been some overuse of the stay in the areas of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's anti-fraud consumer protection laws. The bill excepts these kinds of actions from the automatic stay. The

> States will be able to enforce their police and regulatory powers free from the automatic stay. The bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such actions on a case-by-case basis. By exempting these state actions from the scope of the automatic stay, *the court will be required to examine the state actions more carefully, and with a view to protecting the legitimate interests of the state as well as of the estate,* before it may enjoin actions against the debtor or the estate. *House Report No. 95-595,* 95th Cong., 1st Sess. (1977), accompanying H.R. 8200, at p. 155-156 (emphasis supplied).

Similar language is contained in the Senate Report on the Senate version of the Bankruptcy Act of 1978, S. 2266. *See Senate Report No. 95-989,* 95th Cong., 2nd Sess. (1978), at p. 52. Indeed, both reports emphasize that state police power enforcement actions are not subject to the automatic stay, but if it is necessary, they may be enjoined pursuant to 11 U.S.C. Section 105 where the court may develop a more flexible form of injunction *which protects the states' legitimate police power interests as well as the interest of the parties to the bankruptcy case. House Report No. 95-595* at p. 342; *Senate Report No. 95-989* at p. 51. Thus, the theme repeated thoughout the legislative history of the Bankruptcy Reform Act of 1978 is that when dealing with a state police power enforcement action a bankruptcy court must avoid using a heavy-handed approach and meticulously balance the states' interest in the enforcement of their laws with the interests of the bankruptcy estate.

This Congressional policy was adopted in the language of 11 U.S.C. Section 362 which reflects the Congressional determination that the automatic stay be defined by statute and not left to case-by-case judicial determination. Section 362 states in relevant part as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title operates as a stay, applicable to all entities, of – –
>
> * * *
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> * * *
>
> (b) The filing of a petition under section 301, 302 or 303 of this title does not operate as a stay – –
>
> * * *
>
> (5) under subsection (a) (2) of this section of the *enforcement of a judgment, other than a money judgment,* obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police power or regulatory power; (emphasis supplied).

The distinction created in Section 362(b) (5) is explained in *House Report No. 95-595* as follows:

> Paragraph (5) makes clear that the exception extends *to permit an injunction and enforcement of an injunction,* and to permit the entry of a money judgment, but does not permit enforcement of a money judgment. *Id.* at 343. (emphasis supplied.)

The same language appears in *Senate Report No. 95-989* at p. 52. Thus, the Congressional committee reports clearly indicate that the enforcement of an injunction obtained by a governmental unit in an action to enforce its police or regulatory powers is exempt from the automatic stay in Section 362 while an attempt to enforce a money judgment is subject to the stay.

In light of the thoughtful consideration given to this matter by Congress and the explicit statutory language adopted it would seem that the distinction drawn between injunctions and money judgments for purposes of determining the applicability of the statutory stay would settle the matter. Unfortunately this has not been the case. Instead there has continued to be a splintering of authority throughout the district courts and courts of appeals as to when the statutory stay is applicable against state police power actions. Compare: *In re Hillsdale Foundry Company,* 2 C. B. C. 542 (Bkrtcy. W.D. Mich. 1974) (state action to shut down factory in violation of pollution laws is subject to bankruptcy stay) with *In re Canarico Quarries, Inc.,* 466 F. Supp. 1333 (D.P.R. 1979) (stay inapplicable to state action to shut down factory in violation of pollution laws); Compare: *In re Jacobsmeyer,* 13 B.R. 298 (Bkrtcy. W.D. Mo. 1981) (stay applicable against injunction obtained by state in exercise of its police power which would preclude a viable reorganization plan) with *Donovan v. TMC Industries, LTD,* 20 B.R. 997, 1004 (N.D. Ga. 1982) (stay does not apply against injunction obtained by federal government in

exercise of its police power which would preclude a viable reorganization plan); Compare: *In re Theobald Industries, Inc.*, 16 B.R. 537, 539 (Bkrtcy. D. N.J. 1981) (statutory stay applies against National Labor Relations Board proceeding) with *National Labor Relations Board v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (statutory stay does not apply against NLRB proceedings); Compare: *In re Mason*, 18 B.R. 817 (Bkrtcy. W.D. Tenn. 1982) (statutory stay applies to prevent state from revoking debtors' liquor license) with *Colonial Tavern, Inc. v. Byrne*, 420 F. Supp. 44 (D. Mass. 1976) (stay not applicable to prevent revocation of liquor license); Compare: the Sixth Circuit's decision in this case imposing the stay against an injunction and order appointing a receiver in a state police power enforcement action with *Securities and Exchange Commission v. First Financial Group of Texas*, 645 F.2d 429, 436-439 (5th Cir. 1981), in which the Fifth Circuit held that the stay does not apply against an injunction and order appointing a receiver in a federal police power enforcement action. As a comparison of these cases reveals, the manner in which the language of the statutory stay has been interpreted has led to increased uncertainty rather than clarity in implementing the policy which Congress intended. While some of the cases suggest that the key to reconciling the divergent holdings is whether a state's interest in a case is a pecuniary one or one that directly involves public safety considerations, *Donovan, supra*, at 1001, a clear, definitive statement from this Court would be extremely valuable. As such, the time is ripe for this Court to confront this issue which Congress found important enough to specifically address in the Bankruptcy Reform Act's legislative history.

The case at bar presents an appropriate vehicle for this Court to delineate the extent to which state police power enforcement activities are subject to the Bank-

ruptcy Reform Act's statutory stay. At the hearing before the bankruptcy court the State of Ohio presented two expert witnesses, one from U.S. EPA and one from Ohio EPA, who testified concerning the serious extent of the environmental peril presented by the Chem-Dyne site: fire hazards, leaking drums and tanks of toxic chemical wastes which could cause grave water pollution problems, and chemical vapors which burned and irritated the throats of persons who breathe them. Those experts also added that the situation would grow worse the longer the materials remained on-site. In addition, the state court receiver, Jack Zettler, testified that there was no source of immediate funds other than Kovacs to perform many of the abatement projects which required immediate attention. By contrast, Kovacs offered no evidence before the bankruptcy court. Despite the fact that Ohio presented extensive evidence of an immediate threat to public health and safety, and despite the fact that Ohio produced evidence to demonstrate the need to invoke the February 4, 1980 injunction issued to Kovacs to cooperate with the receiver to accomplish the cleanup ordered by the injunction contained in the July 18, 1979 Stipulation and Judgment Entry, all the courts below focused solely on the impact upon Kovacs' financial future and held that the statutory stay automatically applied. Thus, this case presents this Court with a situation where the State has made a clear showing of the immediate need to enforce injunctions against Kovacs to abate an imminent public health hazard. Yet the court of appeals held that due to the adverse impact upon Debtor Kovacs' pecuniary interests, the statutory stay automatically applies to prevent Ohio's enforcement efforts from going forward.* A sharp factual context concerning the proper interpretation of the automatic statutory stay provision could not, therefore, be more clearly placed before the Court.

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*It is important to understand that all three courts below based their decision upon the automatic, rigid invocation of the statutory stay pursuant to 11 U.S.C. Section 362 and that none of the courts addressed the development of a more flexible remedy pursuant to 11 U.S.C. Section 105.

In addition to the specific facts of this case, the general subject matter of environmental regulation presents a significant context for the Court to address the relationship between the debtor protection concerns of bankruptcy and the state police power concern with protecting public health and welfare. Within the area of environmental law there are numerous ways in which the goals of environmental protection and debtor protection collide. There are two, however, which are critically affected by the Sixth Circuit's decision below, hazardous waste disposal and strip mine reclamation. In both of these areas there has been a repeated pattern of fly-by-night companies which operate illegally, make a quick buck and then leave behind an unabated environmental nightmare, either huge amounts of toxic and chemical wastes which threaten public health or land ravished until it looks like a moonscape. The correction of either situation requires large sums of money. Thus, Congress and the states have been very active in creating new regulatory programs to deal with those situations. *See* Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1201, *et seq.;* Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, *et seq.;* Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601, *et seq.* The decision below, however, if left untouched, allows violators to defy regulatory efforts. The Sixth Circuit's decision allows unscrupulous operators to create an environmental disaster and then cloak themselves with the protection of the bankruptcy court to prevent states from requiring them to abate the hazards which they created. Furthermore, the pattern of such conduct seems to be on the increase as regulatory programs are strengthened.*

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*Indeed in Ohio alone there are several other situations where parties responsible for chemical waste sites or strip mine areas have sought the protection of bankruptcy courts against Ohio's enforcement efforts.

Thus, while Congress considered the relationship between bankruptcy and state police power enforcement activities to be serious enough to warrant Congress to specifically address the matter in the Bankruptcy Reform Act, Congress' efforts have not successfully clarified the matter and there exists a serious divergence of authority within the lower federal courts as to the proper manner in which the automatic stay should be applied to state police power activities. The instant case presents a clear and direct vehicle for addressing this important issue. Therefore, certiorari should be granted.

II. The Decision Below Creates A Conflict Between The Circuits Concerning The Applicability Of The Automatic Statutory Stay To The Enforcement Of Injunctions Obtained By States In The Exercise Of Their Police Power To Protect Public Health And Safety.

As indicated above, there has been a great deal of conflict among the lower federal courts concerning the manner in which the Bankruptcy Code's automatic statutory stay is to be applied in actions to enforce state police power authority. The Sixth Circuit's decision in this case is a classic example of this lack of uniformity because the decision below directly conflicts with the decision of the Fifth Circuit in *Securities and Exchange Commission v. First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981). In addition, the interpretation of the phrase "money judgment" contained in the decision below directly conflicts with what had previously been a uniform definition of that phrase within the federal courts. *See United States Fidelity and Guaranty Co. v. Ft. Misery Highway Dist.,* 22 F.2d 369, 372-373 (9th Cir. 1927); *Fuller v. Aylesworth,* 75 F. 694, 701 (6th Cir. 1896). Each of these conflicts will be examined below.

In *SEC v. First Financial Group of Texas, supra,* the Fifth Circuit was faced with a civil enforcement action brought by the SEC against First Financial for various securities violations. The SEC sought and obtained injunctive relief. Meanwhile, a petition for involuntary bankruptcy had been filed against First Financial. Five days *after* the filing of the bankruptcy petition, the district court in the SEC's enforcement action granted the SEC's motion to appoint a receiver to implement the injunction and assure that there would be no additional

unlawful fraudulent transactions. The receiver was directed to take exclusive control of the corporation's assets. *Id.* at 436-437. First Financial challenged the district court's appointment of the receiver on the grounds that the automatic statutory stay prevented the district court from going forward in the enforcement action to appoint the receiver to implement the previously issued injunction. The Fifth Circuit rejected the claim and stated:

> A continuing civil enforcement proceeding brought by a governmental unit and the enforcement of injunctive relief obtained therein are exempted from the automatic stay provisions of Section 362(a). *Id.* at 437 (emphasis original).

The court noted that the use of receiverships was a well-established mechanism for implementing injunctive relief and that the receivership at issue would "assure complete enforcement of the federal securities' laws." *Id.* at 438. The Fifth Circuit then concluded that the legislative history clearly indicated that Congress did not intend for the automatic stay to apply in such a situation. *Id.* at 439.

The factual pattern in *First Financial* is virtually identical to the case at bar. In both cases a governmental unit pursuant to its police power had obtained injunctive relief to abate violations of law. In both *First Financial* and in the instant case a receiver was appointed to implement the injunction. In both cases the receiver was granted exclusive possession of the debtors' assets. Yet in *First Financial* the Fifth Circuit recognized that the automatic stay did not prevent the implementation of the injunctive relief while the Sixth Circuit below held that the automatic stay prevented Ohio from implementing the injunction.

The conflict between the two decisions is made more blatant when they are considered in light of the fact that the receivership in *First Financial* presented a greater imposition to the bankruptcy estate than in the case at bar. In *First Financial* the receiver maintained exclusive possession of the bankruptcy estate. *Id.* at 439. By contrast, in a separate proceeding in the case at bar the receiver had turned over the assets of the estate to the bankruptcy trustee, and the action of Ohio below was directed not at the bankruptcy estate but at Kovacs' post-petition income which was easonable in light of the assumption made by all the courts below that Kovacs' obligation to perform the injunctions was non-dischargeable.* Furthermore, while the SEC's enforcement effort in *First Financial* was intended to protect the financial investments of the public, a true pecuniary interest, Ohio's efforts have been aimed at safely removing toxic chemical wastes from the middle of a city thereby abating what an expert from U.S. EPA described as an "imminent hazard." Yet the Fifth Circuit held that Congress afforded the SEC the room to protect the pecuniary interests of the investing public while the Sixth Circuit interpreted Section 362 as precluding Ohio from protecting the lives of the citizens of Hamilton. Such contradictory application of the statutory stay to a matter of such grave concern to public health and safety mandates this Court's attention.

---

*In a recent development the district court, citing the Sixth Circuit's decision which is at issue here as "law of the case" affirmed the bankruptcy court's determination that Kovacs' duty to perform the injunction was dischargeable. *See State of Ohio, ex rel. Brown v. Kovacs,* Case No. C-1-82-526 (S.D. Ohio, September 17, 1982). Thus, a decision of the Sixth Circuit made on the assumption of *nondischargeability* has been cited as law of the case requiring a determination of *dischargeability.* While this makes no logical sense, it is an example of the "double speak" which Ohio has constantly faced in its efforts to vindicate its right to protect the health and safety of the citizens of Hamilton, Ohio.

Unfortunately, the conflict between *First Financial* and the case at bar is not the only inconsistency between the holding in this case and previous federal appellate decisions. As previously mentioned, for purposes of determining the applicability of the automatic stay, Congress distinguished, in Section 362(b) (5), between injunctions and money judgments with the stay only being applicable to the latter. The term "money judgment" is a specific term of art. Indeed, as elementary a legal authority as *Black's Law Dictionary* (4th Ed. 1968) defines the term "money judgment" as follows:

> One which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred. *Id.* at p. 980.

The authority cited by *Black's* are decisions of the Sixth and Ninth Circuits in *Fuller v. Aylesworth, supra,* and *United States Fidelity and Guaranty Co. v. Ft. Misery Highway Dist., supra.* In both cases the courts of appeals concluded that a money judgment was an order to pay a sum certain rather than an order to perform an act which, of course, is an injunction. Thus, in reliance upon the uniform holding within the federal courts concerning the definition of money judgment, Congress was able to create an ostensibly clear distinction between money judgments and injunctions. The decision below obliterates this distinction.

The Sixth Circuit's decision adopts the reasoning of the bankruptcy and district courts which recognized that Ohio was enforcing an injunction, not a money judgment. The three courts below, however, reasoned that since Ohio sought to compel Kovacs to spend money to accomplish the acts mandated by the injunction, the injunction was "in essence" a money judgment. 681

F.2d at 456. Effectively, this destroys the distinction which had previously been uniformly accepted within the federal courts between an order to pay a sum certain and an order to perform an act. Even more importantly, the Sixth Circuit's decision conflicts with a group of uniform federal decisions upon which Congress itself relied to create a meaningful distinction between situations in which the automatic stay is and is not applicable. Thus, the court of appeals' decision below rejecting the distinction between money judgments and injunctions previously recognized in *Fuller, supra,* and *Ft. Misery, supra,* creates further confusion in an already confused area and negates Congress' efforts to clarify the matter. Therefore, the situation requires this Court's attention.

The decision below starkly portrays what is happening with the federal courts' conflicting interpretations of what was intended by Congress to be a clear declaration that state police power enforcement actions for injunctive relief are not subject to the automatic statutory stay. Due to the conflicts created by the oblique reasoning of the court below, the confusion in this area will continue to grow if the Sixth Circuit's decision is allowed to stand. Thus, this Court should accept Ohio's petition and grant the writ which the State seeks.

III. The Decision Below Represents A Serious Failure Of The Sixth Circuit, District And Bankruptcy Courts To Honor A Policy Choice Made By Congress Which This Court, In View Of Its Supervisory Power Over Bankruptcy Courts, Should Not Ignore.

In *Maggio v. Zeitz,* 333 U.S. 56, 59 (1948), this Court was faced with a decision of a bankruptcy court ordering the imprisonment of a debtor for an act which the lower court admitted it knew was impossible for the debtor to perform. This Court noted that the internal contradiction in the order imprisoning a person for the failure to perform an act which was admittedly impossible to perform justified the exercise of the Court's supervisory authority over bankruptcy courts. *Id* at 59. A similar internal contradiction in the decisions below in the case at bar justifies the exercise in this case of the Court's supervisory authority over bankruptcy courts.

The Court of Appeals stated below that:

> We concur with the bankruptcy court's conclusion that Section 362 indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition but to deny those units the power to collect money in their enforcement efforts. *Id.* at 456.

After acknowledging the right of states to enforce mandatory injunctions, however, the court then held that the State cannot compel Kovacs to spend money to perform the acts required by the mandatory injunction issued by

the common pleas court, in effect negating the very activity which the Sixth Circuit acknowledged that Congress intended. This internal contradiction requires this Court to address the lower courts' refusal to honor Congress' policy choice concerning the applicability of the statutory stay.

As all the courts below acknowledge, in Section 362(b) (5), Congress intended to distinguish between money judgments and injunctions for purposes of determining the applicability of the automatic statutory stay, with injunctions being exempt from the automatic statutory stay. In *House Report No.* 95-595, *supra,* at p. 174, Congress expressed its dissatisfaction with the manner in which the automatic stay was being administered under the old statute and the Rules of Bankruptcy Procedure. Specifically, the House Committee expressed displeasure with the harm which could accrue to the public as a result of operation of an automatic stay against police power enforcement actions. Thus, the conditions for the operation of the automatic stay were to be expressly defined by statute.

Elsewhere in both the House and Senate reports Congress expressed its intent that actions which are exempt from the automatic stay should be handled in adversary complaints for injunctive relief subject to the traditional equitable principles which apply to requests for injunctive relief. Specifically, both reports declare as follows:

> The court has ample other power to stay actions not covered by the automatic stay. Section 195, of proposed title 11, derived from Bankruptcy Act Section 2a (15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The bankruptcy

> courts are brought within the scope of the All Writs Statute, 28 U.S.C. 1651 (1970), and are given the powers of a court of law, equity, and admiralty (H.R. 8200, Section 243(a), proposed 28 U.S.C. 1481). Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed. *House Report No. 95-595,* p. 342; *Senate Report No. 95-989,* p. 51.

Indeed, the House report explicitly stated that police power actions are not subject to the automatic stay and should be enjoined only on a case-by-case basis and upon such terms as will still protect the state's legitimate police power interests:

> The States will be able to enforce their police and regulatory powers free from the automatic stay. The bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such

> actions on a case-by-case basis. By exempting these State actions from the scope of the automatic stay, the court will be required to examine the State actions more carefully, and with a view to protecting the legitimate interests of the State as well as of the estate, before it may enjoin actions against the debtor or the estate. *House Rep. No. 95-595,* at p. 156.

In contrast to this clear directive to carefully protect legitimate state police power interests, the courts below mechanically issued a stay against Ohio despite the fact that, as the courts themselves admit, the judgment Ohio wishes to enforce is not a money judgment to which the stay applies. The lower courts' heavy-handed extension of the stay to enjoin the Ohio receivership proceeding is thus contrary to the express language of the statute and the explicitly stated intent of Congress to balance the public interest in public health and safety against the interests of the bankruptcy estate, a balancing test which none of the courts below performed. The total failure of any of the three courts below to give any consideration to the interests of Ohio is very distressing, and is particularly irresponsible in light of the peril posed to the citizens of Hamilton by the toxic chemical wastes on the Chem-Dyne site.

Congress clearly stated that the automatic stay was to be defined by statute and could not be arbitrarily expanded without considering the public interest at stake in Ohio's action. Yet the courts below justified their rigid failure to implement the will of Congress by invoking estoppel and claiming that Ohio was "estopped to deny" that it was enforcing a money judgment. 681 F.2d at 456. The error in this contrived device for thwarting the will of Congress is clear.

It has repeatedly been held that when determining whether estoppel applies, a federal court must look to state law of estoppel. *Wilkie v. Brooks,* 515 F.2d 741, 748 (6th Cir. 1975), *cert. denied,* 423 U.S. 996 (1975). Accord: *Gladden v. Pargas, Inc. of Waldorf, Md.,* 575 F.2d 1091 (4th Cir. 1978); *Minne. Farm Bureau Marketing Corp. v. North Dakota Agr. Marketing Ass'n., Inc.,* 563 F.2d 906 (8th Cir. 1977); *United States v. Briggs Manufacturing Co.,* 460 F.2d 1195 (9th Cir. 1972); *Glenn v. State Farm Mutual Insur. Co.,* 341 F.2d 5 (2d Cir. 1965). Ohio law requires six essential elements to justify the invocation of estoppel:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the party subsequently attempts to assert; (2) intention, or at least expectations, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, the essentials generally are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. 20 Ohio Jurisprudence 2d, *Estoppel and Waiver,* Section 35 (1956), p. 499. Accord: *Murec v. United States Steel Corp.,* 195 F. Supp. 137 (N.D. Ohio, 1961).

The elements which are required to justify the imposition of estoppel under Ohio law are virtually identical to those which are required in the vast majority of jurisdictions throughout the country. See 28 American Jurisprudence 2d, *Estoppel and Waiver,* Section 35 (1966), p. 640-642; 31 Corpus Juris Secundum, *Estoppel,* Section 67 (1964), p. 402-403.

Thus, since the six critical elements of estoppel are nearly universally recognized, the following question must be asked: Where in the record is there even a scintilla of evidence establishing any of the necessary elements of estoppel? The silence of all three decisions below on this question is deafening. None of the opinions addresses any of the elements of estoppel or cites any evidence supporting each element. What false representation did Ohio make? What act of the State did Kovacs rely upon to his detriment? Where is any evidence that the State intended to mislead Mr. Kovacs? Where is there any evidence that Mr. Kovacs had less knowledge than the State about any fact upon which he relied to his detriment? The answer to these questions is that such evidence exists nowhere in the record. Indeed, Debtor Kovacs presented no evidence at all in the hearing before the bankruptcy court. Instead, he rested upon his alleged right to a stay under the language of Section 362.

Thus, the nature of the unique estoppel doctrine developed by the courts below in the case at bar becomes clear. They do not use the term "estoppel" in a lawful manner referring to willful misrepresentation and detrimental reliance. Rather, the essence of their use of the term "estoppel" is as follows: "Ohio, you are technically correct. The statutory stay does not apply to you. But we do not like the result of applying the statute in the manner adopted by Congress. Therefore, we will 'estop' you from exercising your rights under the

bankruptcy law as Congress enacted it." This is not estoppel in a lawful and legal sense. It is a refusal of courts to honor the policy declared by Congress because in a specific case the courts disagree with the outcome mandated by the policy Congress adopted. It is also reversible error.

In conclusion, Congress clearly indicated that the enforcement of injunctions obtained by units of government in the exercise of their police power are not subject to the automatic statutory stay of the Bankruptcy Reform Act of 1978. Congress stated that a bankruptcy court may only interfere with such enforcement efforts after a very careful, meticulous balancing of the public interest and the interests of the bankruptcy estate and then only by crafting an injunctive remedy which carefully protects public health and safety. The Sixth Circuit's decision below, however, authorizes a heavy-handed, insensitive, blanket stay against the enforcement of the injunction which Ohio obtained against Kovacs requiring him to remove the toxic chemicals which threatened the health and safety of the citizens of Hamilton. The Sixth Circuit's attempt to justify this defiance of Congressional policy is based upon an unlawful use of the doctrine of estoppel. This attempt by a court to impose its policy judgment rather than that of Congress requires this Court to exercise its supervisory authority over bankruptcy courts. As Chief Justice Burger recently stated:

> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt Congressional action by judicially decreeing what accords with "common sense and public weal." Our constitution vests such responsibilities in the political branches. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978).

CONCLUSION

The case at bar presents a situation which exemplifies a matter of vital concern to state governments across the country involving the conflict between the ability of states to protect public health and safety and the rights of persons seeking the shelter of bankruptcy. In addition, this case also presents a direct conflict between decisions of the Fifth and Sixth Circuits concerning the extent to which governmental attempts to enforce injunctions are exempt from the automatic statutory stay created by the Bankruptcy Reform Act of 1978. Furthermore, the refusal of the court below to honor Congress' policy choice concerning the exemption of injunction actions from the scope of the statutory stay calls for the exercise of this Court's supervisory authority. Therefore, the State of Ohio respectfully submits that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this 12th day of November, 1982 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011; to William H. Eder, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

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Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

82-815

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

No. 81-3320

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: WILLIAM LEE KOVACS,
DEBTOR

STATE OF OHIO,
Plaintiff-Appellant,

v.

WILLIAM LEE KOVACS d/b/a B & W ENTERPRISES; HAMILTON INDUSTRIAL REAL ESTATE COMPANY; RESORT RENTALS; and WHITCO ENTERPRISES,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed June 16, 1982.

Before: ENGEL and BROWN, Circuit Judges; HORTON, District Judge.*

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*The Honorable Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.

PER CURIAM. In 1979, William Kovacs, along with Chem-Dyne Corporation and other business entities, were engaged in the industrial waste disposal business in Hamilton, Ohio. The state of Ohio sued Kovacs individually and as an officer of the defendant corporations, alleging that the defendants had caused water pollution, nuisance conditions and fish kills in violation of Ohio law. Kovacs signed a Stipulation and Judgment Entry in the Butler County Common Pleas Court on July 18, 1979, which enjoined him from causing further pollution and required him to remove all industrial wastes from the premises of Chem-Dyne Corporation within twelve months.

On February 1, 1980, because of noncompliance with the court's earlier judgment, the Common Pleas Court granted Ohio's motion appointing a receiver of Kovacs's non-exempt property and assets along with the assets of related corporate entities. The receiver was also directed to effect the clean-up of the Chem-Dyne site.

Among other things, the state court's order contained the following provisions:

> It is further ordered that Mr. Jack Zettler be appointed receiver of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law;
>
> * * *
>
> The receiver shall have power and authority to receive and collect any and all sums of money due

> or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable . . . .
>
> * * *
>
> It is further ordered . . . that each of the business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

Kovacs filed a personal petition in bankruptcy under Chapter 11 of the Bankruptcy Act on July 17, 1980. This action was converted to a straight bankruptcy under Chapter 7 on September 2, 1980, by order of the United States Bankruptcy Court for the Southern District of Ohio.

On September 13, 1980, Ohio filed a motion in the Butler County Court of Common Pleas for a hearing to determine Kovacs's current employment status and income. In response, Kovacs filed a motion with the bankruptcy court, seeking to restrain the proceedings in the Ohio state court. The bankruptcy judge concluded that the State sought the information in state court about Kovacs's current income "as a preliminary to requesting an order from that court which would require that part of debtor's current income be applied" to the receiver's efforts to complete Kovacs's unfulfilled obligation to clean up the industrial wastes from the Chem-Dyne location. The bankruptcy judge determined that Kovacs was entitled to an automatic stay of the state court proceedings under 11 U.S.C. Section 362 (Supp. 1979), and accordingly enjoined the state of Ohio on October 31, 1980 from proceeding further in state court in its

attempt to levy on Kovacs's post-petition earnings. The bankruptcy court's judgment was affirmed on appeal to the United States District Court for the Southern District of Ohio, Judge Spiegel presiding, on April 30, 1981.

The applicable provisions of 11 U.S.C. Section 362 (Supp. 1979) are as follows:

> Section 362. Automatic stay
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of –
>
> * * *
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; . . .
>
> (b) This filing of a petition under section 301, 302, or 303 of this title does not operate as a stay–
>
> * * *
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; . . .

The bankruptcy court concluded that the issue of whether Kovacs's obligation to clean up the Chem-Dyne site under the Ohio state court's judgment was dischargeable in bankruptcy was not properly before it, since an

adversary proceeding is required to discharge a debtor's obligation; therefore, it assumed for purposes of argument that it was not dischargeable. The bankruptcy court determined:

> The question presented to us is whether what the State is attempting in [its motion in state court to determine Kovacs's current income] is exempted from the automatic stay of Section 362(a)(2) by reason of Section 362(b)(5). We hold that it is not, even though in its express language Section 362(b)(5) says only that enforcement of a money judgment is subject to the Section 362(a)(2) stay, while other enforcement actions obtained by a governmental unit to enforce its regulatory power are excepted from the stay. Neither prior order of the Butler County Common Pleas Court, it is true, gives the State a money judgment with respect to cleaning up the Chem-Dyne premises, but there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him. We hold, therefore, that the State is estopped to deny that it is seeking to enforce a money judgment against debtor.

In *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), this court recently examined the automatic stay provisions of Section 362. The court examined the legislative history of Section 362, which states that governmental action to "prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws" was not subject to the automatic stay. *Id.* at 1112. The court held that the legislative history mandated that the state of Ohio's administration of the worker's compensation claims of the debtor's employees should not be stayed by the bankruptcy court. The court expressly

noted that "[t]he insurance fund, not the debtor's estate, pays the claims for which the employer has paid the premium." *Id.* at 1112-13. The debtor in *Mansfield* was not subject to making payments on its workers' claims that would resemble a money judgment, since payment of claims would come from premium funds already deposited by the debtor with the state, upon which the debtor had no legal claim. Accordingly, the exception to the automatic stay was applicable in that case, because enforcement of a money judgment liability was not imposed upon the debtor, and administration of the claims was pursuant to Ohio's police power.

Marshall v. Tauscher (In re *Tauscher*), 7 B.R. 918 (Bankr. E.D.Wis. 1981), a case discussed in *Mansfield*, held that *assessment* of civil money penalties for child labor violations was non-dischargeable and therefore was subject to the exception to the automatic stay. However, the bankruptcy court also found that the exception would not extend to the *enforcement* of the penalties against the debtor's estate. *See Mansfield, supra* at 1114.

We concur with the bankruptcy court's conclusion that Section 362 indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, but to deny those units the power to collect money in their enforcement efforts. We further concur with the conclusion of the bankruptcy court and the district court that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay. We note that the state court's order appointing a receiver also ordered that Kovacs turn over all his non-exempt assets to the receiver, and authorized the receiver to collect any sums of money that would become payable to Kovacs in the future. There is very little in substance to distinguish

that order and a money judgment. As noted in In re *Canarico Quarries, Inc.*, 466 F.Supp. 1333, 1340 (D.P.R. 1979), Section 362 "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." To permit the state of Ohio to proceed with its state court action would subvert the purpose of the Bankruptcy Act to rehabilitate debtors and to give them relief from harassing creditors.

AFFIRMED.

APPENDIX B

NO. 81-3320

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: WILLIAM LEE KOVACS,
DEBTOR

STATE OF OHIO,
Plaintiff-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a
B & W ENTERPRISES: HAMILTON
INDUSTRIAL REAL ESTATE COMPANY;
RESORT RENTALS; and WHITCO
ENTERPRISES,
Defendants-Appellees.

ORDER DENYING PETITION FOR REHEARING

Filed Aug. 16, 1982

Before: ENGEL and BROWN*; Circuit Judges; HORTON, District Judge.

---

*Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. Section 371(b) on June 16, 1982, and became a Senior Circuit Judge.

No Judge of the court having moved for rehearing *en banc,* the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ signature deleted
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

IN RE:

WILLIAM LEE KOVACS
dba-B & W Enterprises,
Hamilton Industrial Real
Estate Company, Resort Rentals,
and Whitco Enterprises

Debtor

NO: C-1-81-59
Bankruptcy No. B-1-80-1499

OPINION

Filed Apr. 30, 1981

SPIEGEL, J. :

This is an appeal from a decision of the Bankruptcy Court which held, in effect, that the automatic stay provision of Section 362(a)(2) of the Bankruptcy Code applies to an effort by the State of Ohio to enforce a judgment against the debtor and that the exemption from automatic stay of Section 362(b)(5) does not apply to this case.

In 1979 William Kovacs, along with Chem-Dyne Corporation and another defendant, signed a Stipulation

and Judgment Entry in the Butler County Common Pleas Court which enjoined him from causing pollution and ordered him to remove within twelve months all industrial wastes from the premises of Chem-Dyne Corporation. At that time Kovacs, along with other corporate and non-corporate entities, was engaged in the industrial waste disposal business in Hamilton, Ohio.

In February 1980, because the 1979 order was not being complied with, the Common Pleas Court appointed a receiver of Kovacs' non-exempt property and assets, as well as the property and assets of Chem-Dyne Corporation and other business entities. The Court also ordered the receiver to effect compliance with its 1979 order, including removal and proper disposal of all wastes. In July 1980 Kovacs filed a personal petition under Chapter 11 of the Bankruptcy Code which was converted to a straight bankruptcy under Chapter 7 in September 1980. Soon after this, the debtor moved the Bankruptcy Court for a specific stay order to restrain proceedings brought against him in Common Pleas Court by the State of Ohio for the purpose of obtaining post-petition personal earnings of the debtor to assist in the clean up ordered by the Court in 1979. The Bankruptcy Court granted this motion, and the State's appeal to this Court followed.

Section 362(a)(2) of the Bankruptcy Code, 11 U.S.C. Section 362(a)(2), provides:

> a) Except as provided in subsection b of this section, a petition filed under Section 301, 302, or 303 of this Title operates as a stay, applicable to all entities, of- -
>
> * * *
>
> (2) the enforcement, against the debtor or against property of the

> estate, of a judgment obtained before the commencement of the case under this Title;

The exceptions to this automatic stay are codified in Section 362(b) which provides, in relevant part:

> b) The filing of a petition under Section 301, 302, or 303 of this Title does not operate as a stay--
>
> * * *
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

The state argues that the judgment entered by the Butler County Common Pleas Court arose from the state's regulatory or police power and was not a money judgment but simply enjoined the debtor from polluting or creating a nuisance, and additionally ordered him to clean up the property in question. Further, the state contends that its efforts to enforce this judgment by seeking the debtor's post-petition personal earnings to assist in the mandated clean-up do not constitute enforcement of a money judgment. Therefore, the State of Ohio concludes that its enforcement proceeding is exempted from the automatic stay provisions of Section 362(a)(2) by the provision of section 362(b)(5) cited above.

In resolving this issue the Bankruptcy Court held:

> Neither prior order of the Butler County Common Pleas Court, it is true, gives the

> state a money judgment with respect to cleaning up the Chem-Dyne premises, but there is no difference in substance between efforts to collect money from a debtor by securing a Court order, and efforts to enforce a money judgment against him. We hold, therefore, that the state is estopped to deny that it is not seeking to enforce a money judgment against debtor.

In Re William Lee Kovacs, No. 1-80-01499 (Bank. Ct. S.D. Ohio, filed October 31, 1980) at 4-5.

Thus, the Bankruptcy Court found that the state was seeking to collect money just as though it were enforcing a money judgment. After a thorough review of the record in this case, including the transcripts of two hearings, we hold this finding of fact not clearly erroneous. (See, *e.g.,* transcript of September 29, 1980 hearing at 11-12.) We also agree with the Bankruptcy Court's conclusion that the exemption provision of Section 362 (b)(5) does not apply, but the automatic stay of Section (a)(2) is applicable because the state's effort is clearly to enforce a judgment obtained before the filing of the Bankruptcy petition.

At oral argument, the state contended that the Bankruptcy Court was mistaken in ordering a specific stay under Section 362(a) when the stay under that section is automatic. Instead, the state urged, the Bankruptcy Court should have considered ordering a stay under Section 105, after requiring the debtor to show irreparable harm, likelihood of success on the merits and no adequate remedy at law. We find this contention without merit. The Bankruptcy Court's order for a specific stay merely confirmed the stay which was in effect as a result of the automatic action of Section 362.

The record shows that the state instituted proceedings against the debtor after the petition in bankruptcy was filed, without obtaining the Bankruptcy Court's permission (Record of September 29, 1980 hearing, at 13). Thus, it was necessary for the Court to order a specific stay, even though the proceeding theoretically was "automatically" stayed.

In the briefs and on oral argument, there was much discussion of whether the debtor's obligations under the 1979 judgment of the Butler County Common Pleas Court are dischargeable in bankruptcy. However, a determination of this issue is not necessary to the issue before us. Both parties at oral argument agreed that a motion to determine dischargeability is pending in the Bankruptcy Court.

Finally, the Court is somewhat disturbed by its impression that the state is attempting to punish Mr. Kovacs for not complying with the 1979 judgment, and, in the process, is subverting the purpose of the Bankruptcy Code. One of the major goals of the Code is to rehabilitate the debtor and to give him a chance to make a "fresh start" insofar as he has debts which are dischargeable. Until a determination on dischargeability is made by the Bankruptcy Court, the debtor is to be given the benefit of all the rehabilitative provisions of the Code. There are criminal sanctions which the state may invoke against Mr. Kovacs if he has violated environmental protection laws and regulations. The Bankruptcy Code may not be used as a substitute for such criminal sanctions. If the Bankruptcy Court holds that the state's claim against Mr. Kovacs is nondischargeable, then the state may seek relief from the stay and proceed against him in Common Pleas Court. Also, we note that the state may currently apply for relief from the automatic stay under the provisions of Section 362(d).

Having determined that the proceedings in Butler County Common Pleas Court to obtain the debtor's post-petition personal earnings are automatically stayed under Section 362(a)(2) of the Bankruptcy Code, we hereby AFFIRM the decision of the Bankruptcy Court.

SO ORDERED.

/s/ signature deleted
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE

WILLIAM LEE KOVACS
dba/ B & W ENTERPRISES,
HAMILTON COUNTY INDUSTRIAL
REAL ESTATE COMPANY, RESORT
RENTALS and WHITCO
ENTERPRISES
Debtor.

Bankruptcy Case No. 1-80-01499

DECISION

Filed Oct. 31, 1980

At Cincinnati, in said District, on the 31st day of October, 1980:

On July 18, 1980 debtor herein filed a petition for relief under Chapter 11 of the Bankruptcy Code. On September 2, 1980 on the application of debtor, the case was converted to a liquidating bankruptcy under Chapter 7 of the Bankruptcy Code.

Now before us are three matters for decision. The State of Ohio has filed Motion for Leave to Intervene, and also Motion to Dismiss the Proceeding. Also before us is debtor's Motion for Specific Stay Order. In the last mentioned motion, debtor seeks to restrain proceedings

brought by the State of Ohio in the Butler County Common Pleas Court which are designed to recover from the debtor post-petition personal earnings. A hearing was held on the foregoing matters, at the conclusion of which we ordered that the motion of debtor be granted with respect to a then set hearing date in the Butler County Common Pleas Court, and that any other like proceedings be held in abeyance pending the decision which we here issue.

The thrust of both the Motions of the State of Ohio is to oppose any effort by debtor to regain control of the debtor's enterprises which have been placed under the control of a state receiver, (this being the interpretation by the State of the reason that the debtor filed the Chapter 11 proceeding). Such action by the State, however, was mooted upon conversion of the Chapter 11 to a Chapter 7 proceeding. We believe in any case that the controlling issues in these motions are fully dealt with in a consideration of debtor's motion and we therefore proceed to a discussion of it.

The State of Ohio on about September 13, 1980 brought on in the Butler County Common Pleas Court, a Motion for Hearing to Determine Existence of Additional Assets of debtor (hereafter "State's Motion re Assets"). Specifically, the State asked that court to order debtor to appear for a hearing and testimony to elicit information as to his current employment status and income. The State sought that information as a preliminary to requesting an order from that court which would require that part of debtor's current income be applied for a purpose now to be described.

Debtor individually, together with several non-corporate entities and one or more corporate entities, had carried on a business of industrial waste disposal in Hamilton, Ohio. The Environmental Protection Agency

of the State of Ohio in the Butler County Common Pleas Court brought an action against debtor and the other entities, asserting that the disposal operation was not conducted in an acceptable way. There ensued two orders by the Butler County Common Pleas Court, one dated July 18, 1979 and the second, February 4, 1980. In the first order, debtor individually and others agreed to conduct a clean up of the premises employed in the industrial waste disposal operation. In the second order, the court appointed a receiver to perform the clean-up obligations of debtor and the others since they had failed to perform them. The purpose, then, for which State's Motion re Assets was brought was to reach debtor's current income, and to apply that money to the clean-up. It is the State's Motion re Assets against which debtor's Motion for Specific Stay Order is directed.

It is necessary for us to look in some detail at the two orders of the Butler County Common Pleas Court since it is upon them that the respective rights of the parties with which we are here concerned are based. We then must determine how these orders are affected by the several subdivisions of 11 U.S.C. Section 362, and decide the question whether the State has any right to an order by any court requiring that a portion of debtor's current earnings be applied to the clean-up.

The first of the two orders is Stipulation and Judgment Entry of July 19, 1979 which named as defendants Whitten, Kovacs, (debtor herein) and Chem-Dyne Corporation. It was signed personally by the debtor. Under the title "Findings" appear various representations and agreements entered into between the parties to the litigation. The document concludes with a number of orders. Defendants are enjoined from causing "pollution." Defendants are given twelve months within which to remove and dispose of all industrial wastes at the premises. Various subsidiary provisions are included with regard to the manner in which the removal is to be

accomplished, and how that shall be supervised. Defendants are to pay to the Division of Wild Life, Ohio Department of Natural Resources the sum of $75,000.

The second Order was that entered February 4, 1980 where the Butler County Common Pleas Court issued Order Appointing Receiver. That Order appointed Jack Zettler receiver of a number of business entities including Chem-Dyne Corporation, and included all property or assets, real or personal of those business entities. The Order went on to appoint Zettler as receiver of the property or assets of William Kovacs "except to the extent of any property exempt from the control of a receiver by operation of law." Further, the receiver was ordered to effect compliance with the Stipulation and Entry of the Court filed July 18, 1979. The Order states that the receivership shall continue in effect until the wastes had been removed from the premises and disposed of properly.

The State offers considerable authority to support its contention that the obligations imposed upon debtor Kovacs by these two orders are non-dischargeable. Since these obligations are non-dischargeable, says the State, it should be left by the Bankruptcy Court to pursue remedies in furtherance of them. We will assume, but *arguendo* only, in our following discussion that the obligations of the two orders are non-dischargeable.

We turn next to the relevant provisions of 11 U.S.C. Section 362:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of - -
>
> * * *

> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> * * *
>
> (b) The filing of a petition under section 301, 302 or 303 of this title does not operate as a stay --
>
> * * *
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; . . .".

It is self evident that the action taken by the State in trying to reach current earnings of debtor is stayed by 11 U.S.C. Section 362(a)(2), for it has been the position of the State throughout the present motion proceedings that the rights which it is here seeking to enforce stem from the prior orders of the Butler County Common Pleas Court. The question presented to us is whether what the State is attempting in State's Motion re Assets is exempted from the automatic stay of Section 362(a)(2) by reason of Section 362(b)(5). We hold that it is not, even though in its express language Section 362(b)(5) says only that enforcement of a money judgment is subject to the Section 362(a)(2) stay, while other enforcement actions obtained by a governmental unit to enforce its regulatory power are excepted from the stay. Neither prior order of the Butler County Common Pleas Court it is true, gives the State a money judgment with respect to cleaning up the Chem-Dyne premises, but

there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him. We hold, therefore, that the State is estopped to deny that it is [not] seeking to enforce a money judgment against debtor.

In reaching that conclusion, we have looked to the legislative history of the portions of Section 362 under discussion. There we find a legislative intent to draw a line, on the one hand permitting governmental units to enforce their police and regulatory powers by mandatory injunctions, but on the other hand refusing those units the right to collect money in such enforcement efforts. The relevant House and Senate Reports say with respect to Section 362(b)(4) and (5):

> "Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court and since they constitute a fund out of which all creditors are entitled to

> share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.
>
> House Report No. 95-595, 95 Cong., 1st Sess. (1977) 342-3; Senate Report No. 95-989, 95th Cong., 2d.Sess. (1978) 51-2.

Of similar import is the following:

> "Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."

124 Cong. Rec. H. 11, 092 (Sept. 28, 1978); S 17, 409 (Oct. 6, 1978). See also 2 Collier on Bankruptcy (15th ed.) 362-39. While it is true that the State is trying to collect a portion of debtor's post-filing wages, and not to participate in the bankruptcy estate on a preferred basis, this legislative history is relevant in giving insight into the scope intended by Congress for Section 362(b)(4) and (5). It makes clear a general intent to distinguish injunctive and monetary relief.

The State argues that the law is or should be that the automatic stay of Section 362 does not apply to efforts to enforce non-dischargeable obligations. In support of this position, the State cites cases typified by *Brennan v. T & T Trucking, Inc.*, 396 F. Supp. 615 (D.C. Okla, 1975). Its cases are, however, clearly distinguishable. Firstly, none were decided under 11 U.S.C. Section 362 of the Bankruptcy Code, but rather involved application of Bankruptcy Rule 401 under the predecessor Bankruptcy Act. Secondly, in the case before us the State is seeking monetary relief, while in its cited cases, the question involved efforts by the governmental unit to secure injunctive relief.

In its memorandum in support of Motion To Dismiss, the State of Ohio says:

> "The key to the State's position is the non-dischargeable nature of the obligation imposed upon Kovacs by the July 18, 1979 Stipulation and Judgment Entry. Since it is non-dischargeable Kovacs cannot use a Title 11 proceeding to escape the performance of the duty."

The State suggests that its efforts in the Butler County Common Pleas Court should not or cannot be stayed because the duties of Kovacs arising under the Stipulation and Judgment Entry of July 18, 1979 are non-dischargeable. The State thus brings us to an interface between the stay provisions of the Bankruptcy Code 11 U.S.C. Section 362 and the dischargeability section, 11 U.S.C. Section 523. While we had earlier in our decision accepted for purposes of argument that the State is proceeding on a non-dischargeable obligation, we will not here decide that question on the merits. Bankruptcy Rule 701(7) expressly provides that the determination of the dischargeability of a debt is to be determined in an

adversary proceeding. While the State attempts to avoid this point by contending that it is not a claimant, we suggest to the State that, certainly to the extent it desires monetary relief, it maintains that position at its peril. One of the indisputable expansions wrought in the law by the Congress when it enacted the Bankruptcy Code, was in the definition of the word "claim" as found at 11 U.S.C. Section 101(4). In doing so it was the intent of Congress to enhance the "fresh start" given a debtor.

In light of the foregoing discussion we conclude that debtor is correct in his contentions and should prevail on his motion. The State will be stayed from proceeding further in the Butler County Common Pleas Court in attempting to levy on post-filing wages of debtor. Furthermore, since important rights arising under the Bankruptcy laws of the United States are involved, the Motion to Dismiss filed by the State of Ohio will be denied. By this remark it is our intention to dispose of the suggestion of the State of Ohio that this is an appropriate case for abstention. We also deny the State's Motion to Intervene. Intervention is unnecessary to afford to the State of Ohio an opportunity to take those actions in this court which it deems necessary to protect its legitimate rights, particularly since the case has been converted from Chapter 11 to Chapter 7.

/s/ signature deleted
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE

WILLIAM LEE KOVACS
dba/ B & W ENTERPRISES,
HAMILTON COUNTY [sic] INDUSTRIAL
REAL ESTATE COMPANY, RESORT
RENTALS and WHITCO
ENTERPRISES

Debtor

Bankruptcy Case No. 1-80-01499

ORDER ON STATE'S MOTION TO DISMISS THE PROCEEDING, STATE'S MOTION FOR LEAVE TO INTERVENE AND DEBTOR'S MOTION FOR SPECIFIC STAY ORDER.

Filed Oct. 31, 1980

At Cincinnati, in said District,

These motions having come on for hearing before Bankruptcy Judge Burton Perlman, and the issues having been duly heard,

It is ORDERED AND ADJUDGED, for the reasons stated in Decision filed simultaneously herewith, that the issues are found as follows:

1. Motion by State of Ohio for Leave to Intervene is denied.

2. Motion by State of Ohio to Dismiss the Proceedings is denied.

3. Motion by Debtor for Specific Stay Order is granted. The State of Ohio is stayed from proceeding further in Butler County Common Pleas Court in attempting to levy on post-filing wages of debtor.

/s/ signature deleted
United States Bankruptcy Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO, ex rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO,
et al.,
Plaintiffs,

v. **v.**

CHEM–DYNE CORPORATION,
et al.,
Defendants.

Case No. CV76-09-0834

JUDGE MARRS

ORDER APPOINTING RECEIVER

Filed Feb. 4, 1980

Having on February 1, 1980, granted plaintiffs' motion for the appointment of a receiver, subject to further order of this court designating a specific receiver and defining the specific authority to be exercised by such receiver,

IT IS HEREBY ORDERED that Mr. Jack Zettler , who is a resident of this state and not a party herein, be appointed receiver of Chem-Dyne Corporation, Spray-Dyne Corporation, Transenvironmental Corporation, K.O.I. Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial

Real Estate Company (hereinafter the "business entities"), and of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of the aforementioned business entities;

IT IS FURTHER ORDERED that Mr. Jack Zettler be appointed receiver of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law;

IT IS FURTHER ORDERED that the receiver shall forthwith file with the clerk of this court a bond in the sum of $200,000 with surety to be approved by this court conditioned that he will faithfully discharge the duties of receiver in this action and obey the orders of the court herein;

IT IS FURTHER ORDERED that until further order of this court the receiver be and hereby is authorized to take and have complete and exclusive control, possession and custody of all assets and property of the defendant business entities and of defendant Kovacs;

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs and any persons acting under their direction shall upon presentation of a copy of this order deliver to the possession, custody and control of the receiver any and all property or assets in their possession or under their control, and that all persons are enjoined from in any way disturbing the possession, custody, or control of the receiver and from prosecuting any actions which affect the property or assets of the defendant business entities and defendant Kovacs.

IT IS FURTHER ORDERED that the receiver is to effect compliance as expeditiously as practicable with all of the orders entered by this court in its stipulation and judgment entry filed in this case on July 18, 1979, such orders being as follows:

(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code.

(2) The defendants and their employees and agents are permanently enjoined and restrained from causing or allowing the emissions from the facilities at 500 Ford Boulevard of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public.

(3) Within twelve (12) months of the signing of this order the Defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semisolid sludges per month. Compliance with this schedule shall be determined every three (3) months on the basis of the average rate of reduction over the previous three (3) months, except

that during the last three (3) months the net rate must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semisolid sludge in each month.

(4) The Defendants and their employees and agents are to allow the Director of the Ohio Environmental Protection Agency and/or his agents and representatives to conduct a quarterly inventory of industrial wastes and/or other wastes on the premises at 500 Ford Boulevard, and to supply to the director and/or his agents and representatives such additional information as the Director and/or his agents and representatives reasonably determine is necessary in order to assure that the industrial wastes and/or other wastes are being removed and disposed of from the premises at 500 Ford Boulevard at the rate and in accordance with the schedule established in Order No. Three (3).

(5) The removal and disposal of the industrial wastes and/or other wastes required by Order No. Three (3) shall be performed under the supervision and inspection of the Director of the Environmental Protection Agency and/or his agents and representatives.

(6) The Defendants and their employees and agents shall grant the Director of Ohio EPA and/or his agents and representatives access to enter the premises at 500 Ford Boulevard during normal busi-

ness hours for the purpose of assuring that the removal and disposal of the wastes contained in Order No. Three (3) is being conducted in accordance with such additional terms and conditions as required by the Director and/or his agents and representatives pursuant to Order No. Four (4) and Order No. Five (5). The Defendants shall grant such access during normal business hours to the director and/or his agents and representatives without the need for a search warrant.

(7) Upon the removal and disposal of all industrial wastes and other wastes as required by Order No. Three (3), the Defendants and their employees and agents are further permanently enjoined, restrained and ordered to refrain from any activity which would cause the importation into the premises at 500 Ford Boulevard, or the generation on the premises at 500 Ford Boulevard, of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers. The Defendants are further permanently enjoined, restrained and ordered to refrain from having any financial, legal, equitable or other interest in any activity which would cause the importation onto the premises at 500 Ford Boulevard or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers.

(8) The Defendants shall pay to the Division of Wildlife, Ohio Department of Natural Resources the sum of seventy-five thousand dollars ($75,000) with interest thereon at the rate of six percent (6%) as provided by law. By agreement of the Division of Wildlife and the Defendant, said judgment shall be paid according to the following terms and conditions:

(a) On or before September 1, 1979, the Defendants will pay to the order of the Division of Wildlife the sum of twenty-five thousand dollars ($25,000). Five thousand dollars ($5,000) of said amount shall be paid within seven (7) days of the date of this Entry. The remaining twenty thousand dollars ($20,000) plus six percent (6%) per annum interest shall be paid by September 1, 1979.

(b) In addition, the Defendants will pay to the order of the Division of Wildlife twenty-five (25) consecutive monthly installments, each in the amount of two thousand dollars ($2,000) principal amount, plus interest on the unpaid balance at the rate of six percent (6%) per annum from the date of this Entry, computed as of the date of each payment; the first monthly installment of two thousand dollars ($2,000) plus interest, a total of two thousand, two hundred and fifty dollars ($2,250) shall be payable to the order of the Division of Wildlife on or before October 1, 1979 with subsequent installments due on or before the first day of each month thereafter with the remaining unpaid balance of principal and interest payable on or before October 1, 1981.

(c) In the event that any insurance proceeds are paid to the Defendants under any contract providing liability insurance for the Defendants in settlement of the injuries and damages incurred by the State of Ohio, Division of Wildlife, as referred to above in paragraphs Four (4) and Five (5) of the Findings, such proceeds shall be immediately paid over to the order of the Division of Wildlife, to be credited toward the unpaid balance on the principal amount. The payment of any such proceeds to the Division of Wildlife shall be in addition to the $25,000 payment referred to in subparagraph (a) above. In the event that any such proceeds paid to the Division of Wildlife are not sufficient to satisfy the entire unpaid balance on the principal amount, then the Defendants shall continue to pay the monthly installments of two thousand dollars ($2,000) plus interest as provided in subparagraph (b) above until the unpaid balance on the principal amount is extinguished.

(d) If the Defendants shall fail to pay any installments of principal or interest, or any part thereof, under this paragrpah (8) when it becomes due, the Division of Wildlife shall promptly notify the Defendants of such default and shall afford Defendants ten (10) days after such notification within which to cure the default. If the Defendants default on a payment on more than three occasions, whether the default is cured or not, or if the Defendants fail to correct the default

within ten (10) days after the notification provided for herein, then all of the installments and amounts remaining unpaid shall immediately become due and payable in full.

(e) Both principal and interest under the provisions of this paragraph are payble to the order of DIVISON OF WILDLIFE, OHIO DEPARTMENT OF NATURAL RESOURCES, at 1952 Belcher Drive, Building C, Columbus, Ohio 43224, attention: Richard Francis;

(f) The notice from the Division of Wildlife to the Defendants required under subparagraph (d) shall be in writing and shall be by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

Chem-Dyne Corporation
500 Ford Boulevard
Hamilton, Ohio 45011

Attention: Bruce A. Whitten

Any notice made in accordance with this subparagraph shall be deemed notice to all and to each of the Defendants.

IT IS FURTHER ORDERED that the receiver is granted the following authority to implement the provisions of this Court's July 18, 1979 stipulation and judgment entry:

1. The receiver shall have authority to direct, manage, and control all activities, operations, and management of those business entities for which a receiver is

appointed herein. The receiver shall have authority to carry on the operations of such business entities.

2. The receiver shall have power and authority to make contracts necessary to implement the provisions of the July 18, 1979 judgment entry and to carry on any of the businesses for which the receiver is appointed herein. The receiver shall have power and authority to procure the services of any individual, partnership, corporation, or other organization, association, or entity whenever appropriate, necessary, or helpful to implement the orders of this court.

3. The receiver shall have power and authority to borrow money, execute mortgages or give other security, and buy on credit in the name of any of the business entities for which a receiver is appointed herein.

4. The receiver shall have power and authority to make such payments and disbursements as may be necessary and proper to carry into effect the judgment entry of July 18, 1979, or to carry on the operations of the business entities, including the authority to make payments of debt entitled to priority.

5. The receiver shall have power and authority to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable, and the receiver shall have power and authority to do such things and enter into such agreements in connection with the management, care, and preservation of the assets and properties of the defendant business entities and defendant Kovacs as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the properties and assets.

6. The receiver shall have power and authority to issue receivers certificates.

7. The receiver shall have power and authority to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary or proper for the implementation of the terms of the July 18, 1979 judgment entry and of the terms of this order, and likewise to defend, compromise or adjust or otherwise dispose of any and all actions or proceedings instituted against him as receiver or against the defendant business entities and defendant Kovacs, and also to appear in and conduct the defense of any suit or adjust or compromise any actions or proceedings now pending in any court by or against the defendant business entities and defendant Kovacs where such prosecution, defense or other disposition of such actions or proceedings will in the judgment of the receiver be advisable or proper for the implementation of this court's judgment entry of July 18, 1979.

8. Whenever necessary to implement the provisions of the July 18, 1979 judgment entry of this court, the receiver shall have power and authority to sell, lease, or otherwise liquidate or dispose of any assets herein committed to the care and possession of the receiver.

9. The receiver shall have power and authority to petition this court for instructions regarding the exercise of any powers herein provided or duties herein established.

IT IS FURTHER ORDERED that the receivership herein provided shall continue in effect with respect to the defendant business entities and defendant Kovacs until such time as all industrial and/or other wastes, whether solid, liquid, or semi-sold sludge in form, have been removed from the premises at 500 Ford Boulevard,

Hamilton, Ohio and properly disposed of in a lawful manner, and until a formal determination by this court that there has been full compliance with all provisions of the July 18, 1979 judgment entry.

IT IS FURTHER ORDERED that each defendant business entity and defendant Kovacs submit to the receiver within fourteen days of the entry of this order appointing a receiver a report listing by item all property and assets of any kind whatsoever, wherever situated, of such Defendant indicating the location of such property or assets conveyed or otherwise transferred by such defendant Kovacs since September, 1979, and identifying the person to whom or the entity to which such properties or assets were transferred and the present location of such properties or assets.

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the defendant business entities and defendant Kovacs, be enjoined and restrained from in any manner interfering with the receiver in the performance of any duties or the exercise of any powers established by the provisions of this order, and that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

IT IS FURTHER ORDERED that within thirty days of this appointment the receiver shall submit to the court, with a copy supplied to the parties, a report listing all chemical wastes and other wastes on the premises at 500 Ford Boulevard and containing the receiver's recommendations for the lawful disposal of such materials. Any materials which the receiver may wish to dispose of

prior to the submission of the receiver's report to this court and prior to this court's approval of the recommendations contained therein, shall be disposed of only after the receiver has obtained the approval of the Director of the Ohio Environmental Protection Agency or his representative.

IT IS FURTHER ORDERED that the receiver shall submit to the court a monthly compliance report detailing the receiver's progress in implementing this Court's July 18, 1979 judgment entry in this case.

DATE February 4, 1980
/s/ JUDGE MARRS

APPENDIX F

STATE OF OHIO, BUTLER COUNTY
COURT OF COMMON PLEAS

STATE OF OHIO, ex rel,
Plaintiffs

vs.

CHEM DYNE INC., et al,
Defendants

CASE NO. CV76-09-0834

OPINION

Filed February 1, 1980

MARRS, J.

This matter coming on this day for hearing to the Court upon the application of the State of Ohio for an appointment of a Receiver after a consent judgment had been filed in this cause. Evidence was presented, a number of exhibits introduced and arguments were made by counsel.

On the 18th day of July, 1979, a consent decree was filed in this cause and a Stipulation and Judgment Entry signed by Defendant Bruce Whitten, William L. Kovacs, Defendant, and Louis F. Gilligan, their attorney; Dennis Muchnicki, Assistant Attorney General for the State of Ohio and Lester W. Koehler, Law Director for the City of Hamilton. It is Stipulated by this entry that Chem Dyne Corporation, also a defendant in this action, would be bound by its terms and the entry further provided that if defendants Whitten or Kovacs sell their interest in Chem-

Dyne Corporation, that the Stipulation and liability would be assumed by Defendants Whitten, Kovacs, or Chem Dyne Corporation. (See 9 of Stipulation and Judgment Entry).

The Stipulation and Judgment Entry has two major thrusts, namely the payment of a money judgment in the sum of $75,000 in scheduled payments (see 8), and the second thrust being in the nature of a mandatory orderly removal and disposal of "all industrial waste as described in Finding No. 7." The removal was to be systematic subject to a quarterly inventory so that ultimately the premises would be free and clear of the objectionable material.

The evidence offered by the State of Ohio clearly showed that with regard to the money judgment, the terms of the Stipulation were not complied with by the respective defendants. Evidence was offered by the defendant Kovacs to show that attempts were made by the respective defendants to satisfy the terms of the Stipulation but names appeared upon the checks after there had been a change in ownership and officers of the Corporation and said checks were not honored. However, it is to be noted that no attempt was made by the Defendant Kovacs or the Chem Dyne Corporation to properly issue the checks that had not been honored, thus the default in the payments.

It is the finding of this Court that the Defendants have violated the agreement and Stipulation by not paying the State of Ohio the sums of money due under the Judgment Decree.

Considering the second alleged violation with regard to the removal and disposal of the waste materials, the Court heard evidence from the State showing that from the inventory as initially furnished, with the tallying

of additional incoming and outgoing material, that there was very little change, if any, in the beginning inventory of July 19th, 1979 and that of November 19, 1979 and January 22, 1980. Evidence offered by the defendants indicated that the original estimates of inventory were nothing more than "guesstimates" and were not accurate. Additional estimates were offered in the form of pictures, (see exhibits) showing that materials were removed. The State claims that the inventory areas merely reflect removal from one area to another area or that the drums were piled higher in order to clear a specific location.

The Court would find that with regard to the alleged violations with regard to the disposal and removal of the waste material, that there has likewise been a gross abuse by the Defendants of not properly recording the initial inventory and the allowance of additional disposal material (objectionable waste) to enter the premises and the continued operation of the business was a flagrant disregard of the Stipulation and Judgment Decree.

Having found the Defendants in violation of both phases of this Stipulation and Judgment Entry, the Court is faced with the serious matter or question as to whether a Receiver should be appointed under Section 2735.01 of the Revised Code to carry out the July 18th, 1979 entry.

Mr. William Kovacs, as the evidence that was initially heard by this Court in 1976 and again reiterated throughout this proceeding, is indeed an entrepreneur, hard working, and a believer in the free enterprise system. His efforts have produced several corporations that furnish a service to a great number of other corporations in the removal and disposal of corporate waste. These endeavors have apparently been quite profitable and the corporate empires he has built deals in large sums of money. The chemical engineering expertise of Mr. Kovacs is likewise a great factor in the disposal of the various

chemical waste with which his companies are intricately involved. Counsel for the Defendant has reminded the Court that "Receivership is Dictatorship" and would take away from Defendant Kovacs his right to deal in his corporate capacity with that subject matter which he has devoted all of his time and his life.

The Court in disposing of the issue of Receivership would note the differences between the type of business in which the respective Defendants are involved and that of the ordinary private corporation or enterprise. The Court would note that the Defendants in this case are engaged in a business that definitely affects this entire community and conceivably the water for this entire area as well as the wild life, natural resources of the area, and the fish in the streams. Mr. Kovacs is engaged in businesses that very definitely have a wide spread effect on community life and its daily operation and is affected with a public interest which invokes the equity powers of the Court.

This Court has found that the defendants have failed in their agreement to cooperate with the Environmental Protection Agencies and have likewise failed to pay to the State of Ohio money which they have acknowledged due for the killing of wild life, the pollution of the local streams and the killing of fish.

This Court would further feel that proper supervision is definitely in order and that the companies owned and operated by the Chem Dyne chain must be supervised and controlled to the extent of the Judgment Entry and Stipulations of July 18th, 1979 and to that end this Court would order that a Receiver be appointed to accomplish what was agreed upon between the parties.

A formal entry may be presented in accordance herewith and the appointment of a Receiver be effected after conference on Monday, February 4th, 1980 at 10:00 a.m.

APPENDIX G

IN THE

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

STATE OF OHIO, et al.,
Plaintiffs,

—vs—

CHEM–DYNE CORPORATION, et al.,
Defendants.

Case No. CV76-09-0834

Judge Marrs

STIPULATION AND JUDGMENT ENTRY

FINDINGS

(1) Defendants Whitten, Kovacs and Chem-Dyne Corporation, and their employees and agents are involved in the business of waste hauling, recycling and redistribution at their facility located at 500 Ford Boulevard, Hamilton, Ohio. Defendant Spray-Dyne produces antifreeze at the facility. These four Defendants shall collectively be referred to hereafter as "the Defendants."

(2) The Defendants have never received from the Ohio Environmental Protection Agency or U.S. EPA a National Pollutant Discharge Elimination System (hereinafter "NPDES") permit.

(3) Plaintiffs allege and Defendants deny that the Defendants and their employees and their agents have violated Sections 6111.04 and 6111.07 of the Revised Code by negligently causing the placement of "industrial wastes" and/or "other wastes", as those terms are defined in Section 6111.01(C) and (D) of the Revised Code (hereinafter "industrial wastes" and "other wastes"), in a location where, on or about April 24, 1976; July 23, 1976; August 3, 1976; August 5, 1976; August 6, 1976; September 17, 1976; and September 23, 1976, they caused "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code, specifically the Hamilton Hydraulic Canal and the Great Miami River.

(4) Plaintiffs allege and Defendants deny that the Defendants and their employees and agents negligently permitted industrial wastes and/or other wastes to enter and travel through a storm sewer system and its conduits located upon their premises and into the Hamilton Hydraulic Canal, a tributary of the Great Miami River, a watercourse of the State of Ohio.

(5) Plaintiffs allege and Defendants deny that the actions of the Defendants as alleged in Finding No. Four (4) were the direct and proximate cause of the death of over eighteen thousand, one hundred and forty-one (18,141) wild animals of the State of Ohio, as defined in Section 1531.01(X) of the Revised Code, on April 23, 1976; one million, seventy-eight thousand, forty-seven (1,078,047) wild animals, as defined in Section 1531.01 (X) of the Revised Code, on July 22, 1976; and seven hundred, thirty-eight (738) wild animals, as defined in Section 1531.01(X) of the Revised Code, on August 13, 1976.

(6) Plaintiffs allege and Defendants deny that the Defendants and their employees and agents have conducted their business at 500 Ford Boulevard so as to occasion the emission of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public in violation of Section 3767.12 of the Revised Code.

(7) The Defendants currently estimate that they have the following amounts of industrial wastes and/or other wastes stored at their facilities at 500 Ford Boulevard: 850,000 gallons in liquid form and 4,000 barrels of solid or semisolid sludges.

(8) Plaintiffs and Defendants are entering into this Stipulation and Judgment Entry in order to compromise all disputes and/or claims or causes of action asserted in the Complaint or which could have been asserted by the Plaintiffs to the date hereof arising from any action or actions of the Defendants.

(9) By entering into this Stipulation and Judgment Entry the Defendants do not admit any of the allegations of the Complaint and continue to deny same.

(10) Plaintiffs and Defendants agree that in any action to enforce any of the provisions of this Stipulation and Judgment Entry, the Defendants may raise at that time the issue of whether they are entitled to raise a defense that its violation of the terms hereof resulted from causes beyond their control, such as, but not limited to, acts of God, of public enemies, conflicting orders of an entity having police power and jurisdiction over any of the Defendants, or impossibility of any of the Defendants of the performance of the terms hereof. While Plaintiffs disagree that such a defense exists, the parties do, however, agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense, and that the appropriate time to

adjudicate the existence of such a defense is at such time that Plaintiffs seek to enforce the provisions of this Stipulation and Judgment Entry.

ORDERS

WHEREFORE, THE PARTIES HEREBY CONSENT TO AND THE COURT HEREBY ORDERS THAT:

(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code.

(2) The Defendants and their employees and agents are permanently enjoined and restrained from causing or allowing the emission from the facilities at 500 Ford Boulevard of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public.

(3) Within twelve (12) months of the signing of this order the Defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semisolid sludges per month. Complaince with this schedule shall be determined every three (3) months on the basis of the average rate of reduction over the previous three (3) months, except that during the last three (3) months the

net rate of reduction must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semisolid sludge in each month.

(4) The Defendants and their employees and agents are to allow the Director of the Ohio Environmental Protection Agency and/or his agents and representatives to conduct a quarterly inventory of industrial wastes and/or other wastes on the premises at 500 Ford Boulevard, and to supply to the Director and/or his agents and representatives such additional information as the Director and/or his agents and representatives reasonably determine is necessary in order to assure that the industrial wastes and/or other wastes are being removed and disposed from the premises at 500 Ford Boulevard at the rate and in accordance with the schedule established in Order No. Three (3).

(5) The removal and disposal of the industrial wastes and/or other wastes required by Order No. Three (3) shall be performed under the supervision and inspection of the Director of the Environmental Protection Agency and/or his agents and representatives.

(6) The Defendants and their employees and agents shall grant the Director of Ohio EPA and/or his agents and representatives access to enter the premises at 500 Ford Boulevard during normal business hours for the purpose of assuring that the removal and disposal of the wastes contained in Order No. Three (3) is being conducted in accordance with the compliance schedule contained in Order No. Three (3) and in accordance with such additional terms and conditions as required by the Director and/or his agents and representatives pursuant to Order No. Four (4) and Order No. Five (5). The Defendants shall grant such access during normal business hours to the Director and/or his agents and representatives without the need for a search warrant.

(7) Upon the removal and disposal of all industrial wastes and other wastes as required by Order No. Three (3), the Defendants and their employees and agents are further permanently enjoined, restrained and ordered to refrain from any activity which would cause the importation into the premises at 500 Ford Boulevard, or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers. The Defendants are further permanently enjoined, restrained and ordered to refrain from having any financial, legal, equitable or other interest in any activity which would cause the importation onto the premises at 500 Ford Boulevard or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers.

(8) The Defendants shall pay to the Divison of Wildlife Ohio Department of Natural Resources, the sum of seventy-five thousand dollars ($75,000) with interest thereon at the rate of six percent (6%) as provided by law. By agreement of the Division of Wildlife and the Defendants, said judgment shall be paid according to the following terms and conditions:

(a) On or before September 1, 1979, the Defendants will pay to the order of the Division of Wildlife the sum of twenty-five thousand dollars ($25,000). Five thousand dollars ($5,000) of said amount shall be paid within seven (7) days of the date of this Entry. The remaining twenty thousand dollars ($20,000) plus six percent (6%) per annum interest shall be paid by September 1, 1979.

(b) In addition, the Defendants will pay to the order of the Division of Wildlife twenty-five (25) consecutive monthly installments, each in the amount of

two thousand dollars ($2,000) principal amount, plus interest on the unpaid balance at the rate of six percent (6%) per annum from the date of this Entry, computed as of the date of each payment; the first monthly installment of two thousand dollars ($2,000) plus interest, a total of two thousand, two hundred and fifty dollars ($2,250) shall be payable to the order of the Division of Wildlife on or before October 1, 1979, with subsequent installments due on or before the first day of each month thereafter with the remaining unpaid balance of principal and interest payable on or before October 1, 1981.

(c) In the event that any insurance proceeds are paid to the Defendants under any contract providing liability insurance for the Defendants in settlement of the injuries and damages incurred by the State of Ohio, Divison of Wildlife, as referred to above in paragraphs Four (4) and Five (5) of the Findings, such proceeds shall be immediately paid over to the order of the Division of Wildlife, to be credited toward the unpaid balance on the principal amount. The payment of any such proceeds to the Division of Wildlife shall be in addition to the $25,000 payment referred to in subparagraph (a) above. In the event that any such proceeds paid to the Division of Wildlife are not sufficient to satisfy the entire unpaid balance on the principal amount, then the Defendants shall continue to pay the monthly installments of two thousand dollars ($2,000) plus interest as provided in subparagraph (b) above until the unpaid balance on the principal amount is extinguished.

(d) If the Defendants shall fail to pay any installment of principal or interest, or any part thereof, under this paragraph (8) when it becomes due, the Division of Wildlife shall promptly notify the Defendants of such default and shall afford Defendants ten (10) days after such notification within which to cure the default. If the Defendants default on a payment on more than three occasions, whether the default is cured or not, or

if the Defendants fail to correct the default within ten (10) days after the notification provided for herein, then all of the installments and amounts remaining unpaid shall immediately become due and payable in full.

(e) Both principal and interest under the provisions of this paragraph are payable to the order of DIVISION OF WILDLIFE, OHIO DEPARTMENT OF NATURAL RESOURCES, AT 1952 Belcher Drive, Building C, Columbus, Ohio 43224, attention: Richard Francis;

(f) The notice from the Division of Wildlife to the Defendants required under subparagraph (d) shall be in writing and shall be by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

Chem-Dyne Corporation
500 Ford Boulevard
Hamilton, Ohio 45011

Attention: Bruce A. Whitten

Any notice made in accordance with this subparagraph shall be deemed notice to all and to each of the Defendants.

(9) In the event either Defendants WHITTEN or KOVACS would sell their entire interest in CHEM–DYNE CORPORATION and the property located at 500 Ford Boulevard, Hamilton, Ohio, in its entirety, to the other, the Plaintiffs hereby agree to release the selling Defendants WHITTEN or KOVACS as the case may be from the terms of this Stipulation and Judgment Entry, if the entire liability is assumed by the remaining Defendant WHITTEN or KOVACS and CHEM–DYNE CORPORATION.

In the event either the Defendants WHITTEN and KOVACS individually or jointly wish to sell all or any part of their ownership interest in CHEM–DYNE CORPORATION to a third party, the Plaintiffs shall have the right to determine at the time of said sale whether to release the selling Defendants WHITTEN or KOVACS jointly or individually as the case may be from the obligations hereunder. Furthermore, in the event of such a sale, the Defendants are hereby ordered to require that any purchaser assume the liability of the selling Defendant(s).

(10) The Defendants' Third-Party Complaint against Third Party Defendant City of Hamilton is dismissed with prejudice.

APPROVED:

signature lines deleted.

APPENDIX H

RELEVANT PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. Section 105

(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a bankruptcy court may not appoint a receiver in a case under this title.

11 U.S.C. Section 362

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay–

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;
(B) the time the case is dismissed; and
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if—

(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after

notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing—

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

CERTIFICATE OF SERVICE

I certify that three copies of this appendices in support of petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this 12th day of November, 1982 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011; to William H. Eder, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record for Petitioner

Office - Supreme Court, U.S.
FILED
DEC 13 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-815

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a result of the decision of the lower court determining that the debtor's obligations under the injunction obtained by the state of Ohio are dischargeable pursuant to 11 U.S.C. § 727 (b), a case or controversy exists between the parties as required by Article III of the Constitution of the United States in order to confer jurisdiction on this Court to grant the Petition for Writ of Certiorari?

2. Whether the court below erred in ruling that the state of Ohio's efforts to reach the debtor's post-petition personal earnings in order to satisfy a pre-petition judgment issued by a state court were not exempt from the automatic stay provisions of 11 U.S.C. § 362 (a)?

COUNTERSTATEMENT OF STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves initially an interpretation of Article III of the Constitution of the United States and a determination of whether a case or controversy exists between the parties at this time so as to provide this Court jurisdiction to grant the state of Ohio's Petition for Writ of Certiorari. Article III of the Constitution of the United States is set forth in Appendix "A" hereto. Additionally, this case involves an interpretation of 11 U.S.C. § 362 and a determination of whether the bankruptcy court erred in ruling that the state of Ohio's efforts to reach the debtor's post-petition personal earnings in order to satisfy a pre-petition judgment were not exempt from the automatic stay provisions of Section 362 (a) of the Bankruptcy Code. The provisions of 11 U.S.C. § 362 are set forth in Appendix "H" of the Petitioner's Appendices.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CASE NO. 82-815

In Re: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The state of Ohio filed suit in the Butler County Court of Common Pleas, Case No. CV-76-09-0834, on September

29, 1976, alleging that the debtor, the Chem-Dyne Corp. and other entities had violated the environmental laws and regulations of Ohio. The debtor, as well as other defendants, executed a Stipulation and Judgment Entry which was filed in that case on July 18, 1979. (Appendix "G" of Petitioner's Appendices.) While denying any liability on the part of any of the defendants for violation of Ohio's environmental laws, the Stipulation and Judgment Entry, in summary, required all defendants to do three things: (1) stop polluting; (2) clean up any existing pollution at the Chem-Dyne facilities; and (3) pay $75,000 to the Division of Wildlife, Ohio Department of Natural Resources.

The state of Ohio subsequently filed a motion in the Butler County Court of Common Pleas seeking the imposition of a receiver over the assets of the debtor and other defendants and, on February 4, 1980, that court entered an order appointing Jack Zettler as receiver and, *inter alia*, ordering the debtor to turn over to the receiver all his non-exempt assets. (Appendix "E" of Petitioner's Appendices.)

Debtor William Lee Kovacs filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on July 17, 1980. Realizing that the cooperation and vote of the governmental environmental agencies would be required in order to have any feasible plan of arrangement approved, and that such cooperation and vote would not be forthcoming, Kovacs filed an application to convert to straight bankruptcy under Chapter 7 of the Bankruptcy Code and an order adjudicating the debtor a bankrupt and directing bankruptcy was entered on September 2, 1980. Soon thereafter, on September 12, 1980, without applying for relief from the automatic stay provisions of 11 U.S.C.

§ 362, the state of Ohio filed a motion in the Butler County Court of Common Pleas for an order directing a hearing to determine the existence of post-petition assets and earnings of the debtor in order to require the debtor to pay a portion of his post-petition personal earnings to the state court appointed receiver in order to satisfy the obligations of the July 18, 1979 Stipulation and Judgment Entry.

Kovacs then filed a motion for a specific stay on September 19, 1980, seeking an order preventing the state of Ohio from obtaining his post-petition personal earnings until such time as the issue of dischargeability of his obligations under the July 18, 1979 Stipulation and Judgment Entry was decided. On December 31, 1980, the bankruptcy court entered its decision granting the debtor's motion and staying the state of Ohio from proceeding further in the state court in its efforts to levy on post-petition personal earnings of the debtor. (Appendix "D" of Petitioner's Appendices.) That decision subsequently was affirmed by the United States District Court for the Southern District of Ohio (Appendix "C" of Petitioner's Appendices) and by the United States Court of Appeals for the Sixth Circuit. (Appendix "A" of Petitioner's Appendices.) It is from that decision of the Sixth Circuit that the state of Ohio has filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. Since this action began, both the bankruptcy court and the district court ruled that the debtor's obligations to the state of Ohio are dischargeable under 11 U.S.C. § 727 (b). For that reason, no case or controversy exists between the parties, so that the question on which this appeal is based has become moot.

2. No important question of federal law deserving this Court's consideration is presented.

3. No conflict exists between the decision below and other circuits concerning the issue raised in this case.

4. The decision below requires no intervention of this court in the exercise of its supervisory powers.

I. NO CASE OR CONTROVERSY CURRENTLY EXISTS BETWEEN THE PARTIES, WITH THE RESULT THAT THE INSTANT CASE HAS BEEN RENDERED MOOT.

On October 20, 1980, the Petitioner filed a complaint to determine the dischargeability of the debtor's obligations under the injunction issued by the state court. As the state of Ohio admits in a footnote on page 17 of its Petition, the bankruptcy court, on March 30, 1982, entered a final judgment entry in favor of the debtor based on its decision of February 23, 1982, holding that the obligations of the debtor under the state court injunction were dischargeable in bankruptcy. For the court's convenience, a copy of that decision is included herewith as Appendix "B." On September 17, 1982, the district court

entered its decision affirming the bankruptcy court's determination that the debtor's obligations under the injunction were dischargeable in bankruptcy. A copy of that unreported decision is included herewith as Appendix "C".

> The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina* v. *Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971), a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve " 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Ibid.*, quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1973). As the Court noted last Term, in an opinion of Mr. Justice Brennan, *Steffel* v. *Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974): "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. [113,] 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 [(1973)]; *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950)."

Preiser v. *Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975).

The district court has ruled that the debtor's obligations under the state court injunction are dischargeable under 11 U.S.C. § 727. Consequently, the state of Ohio would be unable to seek to collect the post-petition personal earn-

ings of the debtor even if the decision of the Sixth Circuit were reversed by this Court. As a result, there currently is no dispute between the parties concerning the issues decided by the court below, nor is there any specific relief which could be granted the Petitioner in the instant case.

Respondent respectfully submits, additionally, that this matter should not be heard under the "capable of repetition, yet evades review," standard. The facts of this case are so unique that they preclude the Petitioner from confronting a similar instance in the future, nor do they suggest that some governmental agency will always be faced with similar issues. *See, Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, reh. den. 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973). The Respondent is aware of no case which has reached this Court on Petition for Writ of Certiorari involving the following facts in sequence: (1) the granting of a motion for a specific stay pursuant to Section 362; (2) a decision that the obligations of the debtor under the judgment stayed are dischargeable, and (3) a Petition for Writ of Certiorari to this Court concerning the granting of the Section 362 stay. Additionally, the record below is devoid of any instances in which the Petitioner has sought to obtain post-petition personal earnings for the purpose of satisfying a pre-petition injunction from an individual debtor who has sought relief under Chapter 7 of the Bankruptcy Code.

The case below has become moot, and should be remanded to the Court of Appeals with directions to vacate the judgments of the district court and the bankruptcy court and to remand the case for dismissal in accordance with *Great Western Sugar Co.* v. *Nelson,* 442 U.S. 92, 99 S.Ct. 2149, 60 L.Ed.2d 735 (1979).

II. NO IMPORTANT QUESTION OF FEDERAL LAW DESERVING THIS COURT'S CONSIDERATION IS PRESENTED BY THE DECISION BELOW.

It is important initially to outline what this case does not involve. It does not involve a corporate debtor or business reorganization under Chapters 11 or 13 of the Bankruptcy Code, but rather involves a Chapter 7 proceeding for an individual debtor. This case does not involve that portion of the July 18, 1979, Stipulation and Judgment Entry requiring the debtor to stop polluting at the Chem-Dyne facilities, nor does it involve that portion of the Stipulation and Judgment Entry requiring the debtor to pay $75,000, which the state of Ohio concedes constitutes a money judgment at a footnote on page 2 of the Petition for Writ of Certiorari. Rather, this case involves the efforts of the state of Ohio to obtain personal earnings acquired by an individual debtor subsequent to the filing of a Chapter 7 liquidation petition for relief under the Bankruptcy Code, with the record containing no evidence that the amount the state might receive would be of any benefit in abating any existing pollution or, in fact, would justify the cost of the state's efforts to collect those personal earnings.

The state of Ohio, in its primary argument, seeks to leap from a consideration of whether a judgment by the Sixth Circuit staying Petitioner's efforts to obtain post-petition personal earnings of the debtor in order to satisfy a pre-petition judgment is worthy of this Court's review to a determination that the decision below should serve as a springboard for a comprehensive review, examination and decision by this Court of the Congressional intent, history, and specific wording of the provisions of 11 U.S.C.

§ 362. Such an approach would negate the underlying philosophy of the granting of Petitions for Writ of Certiorari, which is that the granting of such petitions is a matter of sound judicial discretion and not one of right on the part of the Petitioner. United States Supreme Court Rule 17.1.

In fact, the decision below is one which is extremely limited in its issues, its holding and its effect, whether that effect be future interpretations of 11 U.S.C. § 362 or whether that effect be upon the enforcement by the state of Ohio of its police power and its environmental laws.

The Petitioner continues throughout the Petition for Writ of Certiorari to assert, as it did on Page 8, that "state police power enforcement actions are not subject to the automatic stay . . . " That simply is not true. What is true is that enforcement of a governmental unit's police or regulatory power, *other than the enforcement of a money judgment,* is not subject to the automatic stay provisions of Section 362. What the lower court decided, contrary to the assertions of the Petitioner, is that the state of Ohio was attempting to enforce a money judgment against the debtor. It is for that reason, in a separate but related matter, that the District Court for the Southern District of Ohio ruled that the debtor's obligations under the July 18, 1979 Stipulation and Judgment Entry are dischargeable in bankruptcy. (Appendix C)

The state of Ohio spends considerable effort contrasting individual cases in an effort to defend its assertion that the courts have interpreted the statute at issue, 11 U.S.C. § 362, in such a way as to result in uncertainty rather than clarity. The citations and arguments by the Petitioner are totally misleading.

Both *In re Hillsdale Foundry Co.*, 2 C.B.C. 542 (Bkrtcy. W.D. Mich. 1974) and *In re Canarico Quarries, Inc.*, 466

F.Supp. 133 (D.P.R. 1979) involve the issue of the automatic stay under the previous Bankruptcy Act and not the Bankruptcy Reform Act of 1978, and, further, both involve the issue of whether a debtor may continue operation in violation of the state's pollution laws. There is no issue in this case of whether the debtor may continue to operate in violation of the state's pollution laws.

The state of Ohio then inaccurately contrasts two decisions concerning the automatic stay provisions of § 362 as they pertain to proceedings before the National Labor Relations Board. *In re Theobald Industries, Inc.*, 16 B.R. 537 (Bkrtcy. D.N.J. 1981) specifically issued its ruling on the basis of Section 105 (a) of the Bankruptcy Code and not on Section 362. Further, the court noted there that the proceedings sought to obtain pecuniary advantages and therefore affected the estate of the debtor and not the protection of the public safety and health. The court in *National Labor Relations Board* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981), while concluding that an enforcement proceeding by the NLRB on a charge of unfair labor practices was exempt from the automatic stay provisions according to § 362 (b) (4), noted that their decision would allow injunctive relief and an entry of judgment for back pay. The court continued, however, and stated that "should it be necessary to enforce the judgment for back pay, a different question would be presented. We express no opinion as to whether an action to execute or enforce a money judgment would be exempt from the automatic stay." *Id.*, at 293. Respondent respectfully submits that there is no substantive difference between an action to enforce a judgment for backpay and an action to seek the debtor's post-petition personal earnings in satisfaction of a pre-petition judgment.

The state of Ohio also compares two decisions which

concern the state's efforts to revoke a debtor's liquor license, again erroneously suggesting that the decisions may cause confusion as to the meaning of § 362. *In re Mason,* 18 B.R. 817 (Bkrtcy. W.D. Tenn. 1982) held that the action of the State of Tennessee to revoke a liquor license of an operating business was not stayed under the Bankruptcy Reform Act of 1978 inasmuch as the state was not attempting to collect a pre-petition debt, *i.e.,* was not attempting to collect money, but then went forward and invoked its powers under Section 105 of the Bankruptcy Code to stay the state from proceeding. *Colonial Tavern, Inc.* v. *Bryne,* 420 F. Supp. 44 (D.Mass. 1976) did not even deal with Bankruptcy Reform Act of 1978, but was decided some three years before the effective date of the statute at issue herein.

Finally, both *In re Jacoosmeyer,* 13 B.R. 298 (Bkrtcy. W.D. Mo. 1981) and *Donovan* v. *TMC Industries, Ltd.,* 20 BR 997 (N.D. Ga. 1982) involved the application of the automatic stay to reorganizations of businesses, and did not address the issue of whether an individual debtor can be required to pay money in satisfaction of a pre-petition judgment, when the money sought to be obtained by the state is limited to post-petition personal earnings.

Apart from the fact that the Petitioner inaccurately cited the various cases to establish a conflict, this action is so limited in its factual parameters and effects that it does not present an important question of federal law deserving this Court's time and consideration. There is no evidence in the record that the denial of the state of Ohio's efforts to obtain a portion of the debtor's post-petition personal earnings hindered or prevented the state of Ohio from prohibiting future pollution by the debtor, nor is there any evidence that, were the state successful in obtaining those post-petition personal earnings, the amount of money would assist in any manner the state in cleaning up any

pollution which might exist. Instead, as suggested by Judge Spiegel in rendering his decision for the United States District Court, the state appears to be attempting to punish the debtor and, in the process, subverting the purpose of the Bankruptcy Code. Additionally, as Judge Spiegel pointed out, the state could have applied for relief from the automatic stay under the provisions of § 362 (d) had it been able to show that the stay was impeding the enforcement of its police and regulatory powers. (Appendix "C" of Petitioner's Appendices at 14.)

This case is limited to the sole issue of whether the state of Ohio's efforts to obtain money from the debtor to satisfy a pre-petition judgment constitutes an effort by the state to enforce a money judgment. All three lower courts have ruled that it does constitute an effort to enforce a money judgment and, for that reason, is subject to the automatic stay provisions of § 362 (a). Respondent is unable to find any other cases interpreting § 362 which deal with the issue of whether post-petition personal earnings of the debtor can be taken by a governmental unit in order to satisfy a judgment obtained by that governmental unit against the debtor prior to the filing of the debtor's petition in bankruptcy. Nor is there any indication that the cardinal facts of this case are such as will likely be repeated in such frequency as to involve an important question of federal law.

Finally, Respondent suggests that this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line* Co., 454 U.S. 1029; 102 S.Ct. 564; 102 S.Ct. 1270; 102 S.Ct. 1421; 102 S.Ct. 2858 (1982), and the subsequent staying of that judgment by this Court until December 24, 1982, significantly reduces any importance this case might have. Although the essence of the Court's decision in *Northern Pipeline Construction Co.* dealt with the inter-

play of Article III of the Constitution and the Bankruptcy Reform Act of 1978, there is no assuredness that substantive changes in the bankruptcy laws will not be made by Congress prior to December 24, 1982, with the result that any decision rendered herein would be of no assistance in providing future guidance for lower courts in interpreting and effect and meaning of § 362 of the Bankruptcy Code.

III. NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND OTHER CIRCUITS CONCERNING THE ISSUE OF THIS CASE.

The state of Ohio asserts that the decision of the Sixth Circuit below conflicts with the decision of the Fifth Circuit in *Securities and Exchange Commission* v. *First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981), and further asserts that the factual patterns of both cases are virtually identical. Neither assertion is accurate or incisive and reflects the failure of the Petitioner to accept the purposes of the exceptions to the automatic stay provisions of 11 U.S.C. § 362 (a) contained in 11 U.S.C. § 362 (b) (5).

The issue in *First Financial* was whether the district court, during the course of a continuing civil enforcement action which was not argued by the debtor to be subject to the automatic stay of 11 U.S.C. § 362 (a), could appoint a temporary receiver notwithstanding the automatic stay against "any act to obtain possession of property" of the debtor pursuant to 11 U.S.C. § 362 (a) (3). The issue in this case is whether the state of Ohio's attempt to collect post-petition personal earnings of the debtor to satisfy a pre-petition judgment granted by a state court was subject to the automatic stay provisions of 11 U.S.C. § 362 (a).

The Fifth Circuit in *First Financial* ruled that the ap-

pointment of a receiver was a necessary ancilliary form of relief in the civil enforcement action in order to prevent future violations of the law and wrongdoings and in order to insure that the corporate debtor's assets would not be diverted or wasted to the detriment of the corporate debtor's creditors. That result was obtained when the state court appointed a receiver of the debtor's asset in the instant case on February 4, 1980. The appointment of a receiver in *First Financial* prevented future violations of law and did not require payment of monies by the debtor; there is no contention that the debtor in this case has violated any environmental laws or regulations since the appointment of a receiver on February 4, 1980. The Fifth Circuit in *First Financial* found that the appointment of a temporary receiver was a *necessary* ancilliary form of relief in order to afford the SEC the injunctive relief to which it was entitled; there has been no finding, nor evidence presented to support any finding, that the collection by the state of Ohio of a portion of the debtor's post-petition personal earnings is a *necessary* ancilliary form of relief in order to grant the state of Ohio's injunctive relief.

There is no conflict between a decision which allows the appointment of a receiver over a debtor's assets in order to prevent future violations of the law and dissipation of the debtor's estate and a decision which denies a governmental agency, without relief from the automatic stay provisions of 11 U.S.C. § 362, the right to obtain money from the debtor in satisfaction of a pre-petition judgment. In essence, the Fifth Circuit's decision properly allowed the governmental agency to implement injunctive relief by preventing future violations of the law through the appointment of a receiver, while the efforts of the state of Ohio to obtain post-petition income from the debtor in this case bears no relationship to the injunctive relief of

forbidding future violation of the state's environmental laws and regulations by the debtor. The distinction was noted by the Sixth Circuit in *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), where the court, after holding that the state of Ohio's administration of the workers' compensation claims of the debtor's employees were not subject to the automatic stay of 11 U.S.C. § 362, noted that "[t]he insurance fund, not the debtor's estate, pays the claims for which the employer has paid the premium." *Id.* at 1112-13. In this instance, the state of Ohio seeks the payment of money from the debtor.

The Petitioner argues additionally that the decision below conflicts with previous uniform decisions of the various circuits concerning the definition of "money judgment." That assertion ignores the congressional history of the Bankruptcy Reform Act of 1978 so often cited by the Petitioner. The congressional committee reports explaining the exemption from the 11 U.S.C. § 362 (a) automatic stay contained in 11 U.S.C. § 362 (b) (5) cited two examples wherein governmental actions had been held subject to the automatic stay and would not be stayed under Section 362 as contained in the Bankruptcy Code. Both cases involved efforts of a governmental agency to prevent future violations of state laws, in one instance being continued violation of a state's environmental laws and in the other continued violations of a state's consumer protection laws. No issue exists in the instant matter concerning continued violations of the state's environmental laws by the debtor.

Additionally, the state's argument fails to acknowledge that, as a consequence of the specific purposes and goals of the federal bankruptcy laws, the definitions assigned to legal terminology by other courts are not binding upon the bankruptcy courts. *See, e.g., Matter of Gentile*, 16 B.R.

381 (Bkrtcy. S.D. Ohio 1982); *In re Miller*, 17 B.R. 773 (Bkrtcy. N.D. Ohio 1982), both of which state unequivocably that the meaning of "alimony" and "support and maintenance" assigned by non-bankruptcy courts are not controlling upon a bankruptcy court in determining whether an obligation is non-dischargeable as support and maintenance pursuant to Section 523 of the Bankruptcy Code. The same thrust is found in those numerous cases which, in deciding whether a governmental agency is exercising its police powers, distinguish between those cases in which the governmental agency's interest is a pecuniary one and those in which the governmental agency's interest is one involving public safety considerations, all of which are extensively discussed by the court in *Donovan* v. *TMC Industries, Ltd., supra.*

There is no conflict, therefore, between the decision below and the Fifth Circuit's decision in *First Financial*, nor is there any conflict involving the definition of "money judgment," as that phrase is contained in 11 U.S.C. § 362 (b) (5).

IV. THE DECISION BELOW REQUIRES NO INTERVENTION OF THIS COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS.

In its final argument, the state of Ohio asserts that the Sixth Circuit, in refusing to allow the state of Ohio to obtain the debtor's post-petition personal earnings in satisfaction of the pre-petition state court injunction, so seriously violated the policy choice made by Congress that governmental agencies be able to enforce their police and regulatory powers free from the automatic stay that this Court should intervene pursuant to its supervisory authority over

bankruptcy courts. That argument is erroneous both as to the decision of the Sixth Circuit below and as to the Congressional intent in enacting the § 362 (b) (5) exception to the automatic stay provisions of § 362 (a).

Initially, contrary to the assertion of the Petitioner that the courts below admitted that the state of Ohio was not seeking to enforce a money judgment, the Sixth Circuit stated unequivocably "that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay." (Appendix A of Petitioner's Appendices at 6.) Indeed, the Sixth Circuit additionally found that the state court order appointing the receiver could not be distinguished in substance from a money judgment because of its requirement that the receiver obtain all non-exempt assets of the debtor, as well as any sums of money which would become payable to the debtor in the future.

Essentially, the state fails to accept that a court order may be both an injunction and a money judgment. There is no difference in substance between the efforts of the state of Ohio to require the debtor to pay money to the receiver and the requirement of the July 18, 1979 Stipulation and Judgment Entry that the debtor pay $75,000 to the Ohio Department of Natural Resources, a portion of the order which the state of Ohio concedes constitutes a money judgment. (Petition for Writ of Certiorari at page 2.)

The Petitioner's argument that the holding below is contrary to the intent of Congress in enacting 11 U.S.C. § 362 (b) (5) is equally erroneous. The two examples given in the House Report on the Bankruptcy Reform Act of 1978 concerning the exemptions from the automatic stay provisions are illustrative. The first example involved the imposition of a stay which prevented the State of

Maine from closing a plant which was then violating the state's environmental laws. The second example involved the imposition of the stay preventing the state of Nevada from obtaining an injunction to prevent continued violation of anti-fraud consumer protection laws. *See, House Report, No. 95-595,* 95th Cong., 1st Sess. (1977), accompanying H.R. 8200, at p. 155-156.

As noted by the Sixth Circuit in *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), the purpose of the § 362 (b) (5) exemption was to allow governmental action which would prevent or stop violation of the state's police or regulatory laws, not to allow states to obtain money from the debtor in furtherance of the exercise of its police power or regulatory power. In the instant case, Ohio is not seeking to prevent the debtor from further violating its environmental laws, nor is the state seeking the imposition of a receiver in order to insure against future violations of its laws by the debtor. Those goals were accomplished almost three years ago with the appointment of a receiver by the state court on February 4, 1980.

The state of Ohio expends additional energy arguing that the Sixth Circuit decision was erroneous in that it did not enter a "meticulous balancing of the public interests and the interests of the bankruptcy estate . . . " (Petition for Writ of Certiorari at 26). That argument is of no merit because the decision below was that the state of Ohio was seeking to enforce a money judgment in violation of the automatic stay provisions of § 362 (a), and was not based on the authority of the bankruptcy court to grant a stay pursuant to 11 U.S.C. § 105.

Inasmuch as the decision below both enforced the Congressional intent behind the enactment of § 362 (b) (5) and properly applied the automatic stay provisions of § 362 (a),

there is no necessity or justification for the involvement of this Court pursuant to its powers of supervision over the bankruptcy courts.

CONCLUSION

The question on which this appeal is based has become moot, so that the Court should vacate the judgment of the Sixth Circuit and remand the case with instructions that the action be dismissed. In the alternative, this Court should not grant the Petition for Writ of Certiorari because the decision below is not in conflict with the decision of any other federal court of appeals on the same matter, nor is there any conflict between the decision below and any state court of last resort, nor is any important question of federal law deserving this Court's consideration presented, nor does the decision below so far depart from the usual course of judicial proceedings so as to require this Court to exercise its power of supervision.

Respectfully submitted,

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COUNTY OF HAMILTON)
) SS:
STATE OF OHIO)

AFFIDAVIT OF SERVICE

I, Steve Williams, an attorney in the office of Messrs. Wood, Lamping, Slutz & Reckman, a member of which, Harry M. Hoffheimer, is counsel of record for William Lee Kovacs, Appellee herein, depose and say that three copies of this brief in opposition to petition for writ of of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid this ..... day of December, 1982, to William J. Brown, Attorney General of Ohio, E. Dennis Muchnicki, Assistant Attorney General and Stephen J. Willey, Assistant Attorney General, all at State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 45215; to John A. Garretson, 118 S. Broad Street, Hamilton, Ohio 45011, and to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

Steve Williams
Co-Counsel for Respondent

Sworn to before me and subscribed in my presence this

—— day of December, 1982.

Notary Public

APPENDIX A

CONSTITUTION OF THE UNITED STATES

ARTICLE III.–THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DISTRICT

Adversary File No. 1-80-0249
(Related Case No. 1-80-01499)

IN RE WILLIAM LEE KOVACS
dba/ B & W Enterprises, Hamilton Industrial Real Estate Company, Resort Rentals and Whitco Enterprises,

Debtor,

STATE OF OHIO, et rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO, et al,

Plaintiff,

v.

WILLIAM LEE KOVACS, et al.

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 23, 1982)

At Cincinnati, in said District, on the *23rd* day of February, 1982:

Defendant in this adversary proceeding is debtor in the related bankruptcy case. Defendant was a party to state

court litigation brought by the State of Ohio, on the relation of its Attorney General, director of Environmental Protection and Department of Natural Resources, which eventuated in an agreed Judgment Entry filed in the Butler County Court of Common Pleas. That Entry personally bound defendant to certain obligations. In the instant litigation, the plaintiff State of Ohio seeks a declaration that the obligations imposed upon defendant by the consent decree are non-dischargeable. It is to be noted that the complaint in this proceeding is not limited to the foregoing relief, but seeks in addition relief by way of an injunction against defendant and the trustee from taking any action to recover assets from the state court receiver or from interfering with that receiver in the performance of his duties.

The evidentiary record upon which this motion proceeds consists entirely of a stipulation entered into between the parties to which are attached Exhibits A through J. The following facts are found based upon the stipulation. Defendant and one Bruce Whitten were the chief executive officers of Chem-Dyne Corporation which was engaged in the business of brokering, hauling, storing, disposing and recycling of industrial and hazardous waste at a facility in Hamilton Ohio. The State of Ohio filed the above mentioned suit in Butler County Common Pleas Court against Chem-Dyne Corporation, other corporate entities, and Whitten and defendant, the latter being sued both as individuals and officers of Chem-Dyne. The gravamen of the complaint was that defendants had caused water pollution and a public nuisance, contrary to the laws of Ohio, by the manner in which they conducted their business. The litigation was terminated by a stipulation and Judgment Entry filed on July 18, 1979 which Entry was signed personally by defendant. The Judgment Entry ordered the

defendants, including defendant here, inter alia, to: refrain from causing water pollution; refrain from causing or allowing the emission of noxious exhalations or noisome or offensive smells; remove and dispose of all industrial waste and/or other wastes on the premises within twelve (12) months; and pay $75,000.00 to the Department of Natural Resources. Because defendants did not do what was required of them by the Judgment Entry, the State of Ohio sought appointment of a receiver to accomplish the requirements of the Judgment Entry. The court granted that motion and appointed a receiver. The order appointing the receiver established, inter alia, the receiver's authority and powers to carry into effect the obligations imposed upon defendant and the others by the Judgment Entry, and required defendant to cooperate with the receiver.

In its memorandum in chief (p.15) movant states the provisions of the Judgment Entry imposing obligations upon defendants which plaintiff here seeks to have declared non-dischargeable: to refrain from causing water pollution in violation of Chapter 6111; refrain from creating a nuisance by not causing or allowing the emission of noxious exhalations or noisome or offensive smells, to remove and dispose of all industrial and/or other wastes from the premises at 500 Ford Boulevard within twelve months from the signing of the order; and to make a certain payment to the Ohio Department of Natural Resources. (In its memorandum plaintiff says that the instant proceeding does not concern the obligation of defendant to pay a monetary penalty to the Division of Wild-life, since plaintiff concedes that that provision creates a right to payment which constitutes a claim, and therefore the last named injunctive provision is not, says the plaintiff, to be a subject of the present motion.) Furthermore, it is clear that the negative injunctions, to refrain from causing water

pollution etc. and to refrain from creating a nuisance etc. are mooted since defendant is not in possession of the premises, since a receiver has been installed there. This leaves as the real subject of the present motion the affirmative obligation imposed upon defendant by the Judgment Entry that he remove and dispose of all industrial and/or other wastes at the subject premises. It is plaintiff's position that this obligation is non-dischargeable as a matter of law. Its theory is that that obligation does not constitute a claim or debt susceptible to discharge under 11 U.S.C. § 727 (b), and a discharge extends only to debts and claims.

While the complaint in this proceeding to the extent here relevant is entitled Complaint to Determine Non-Dischargeability, the usual section of the Bankruptcy Code which comes into play when questions of dischargeability arise, 11 U.S.C. § 523, is not invoked by plaintiff. Instead, plaintiff appears to seek a declaration that the aforementioned affirmative obligation of the state court Judgment Entry will not be discharged by the discharge which may be granted to debtor in the related bankruptcy case.

As a relevant part of the background to the present initative of plaintiff State of Ohio, we note that in the related bankruptcy case of debtor, on October 31, 1980 there was entered a Decision (hereafter "Prior Decision") by this court on debtor's Motion for Specific Stay Order. In that Motion, debtor had sought to restrain proceedings brought by the State of Ohio in the Butler County Common Pleas Court designated to recover from debtor post-petition personal earnings. We granted that motion, holding that efforts to make such collection were within the stay provisions of 11 U.S.C. § 362. In our Decision, we said that: "We hold, therefore, that the State is estopped to deny that it is not seeking to enforce a money judgment against debtor." The District Court affirmed our Decision

(April 30, 1981), the Court making express mention with approval of the above quoted holding. We are informed that the State of Ohio is pursuing a further appeal to the Sixth Circuit Court of Appeals in that matter.

What is at stake in the present motion is whether defendant's bankruptcy will discharge the affirmative obligation imposed upon him by the Judgment Entry, that he remove and dispose of all industrial and/or other wastes at the subject premises. If plaintiff is successful here, it would be able to levy on defendant's wages, the action prevented by our Prior Decision, after defendant's bankruptcy case is closed and/or the stay of 11 U.S.C. § 362 as interpreted by our Prior Decision is no longer in force. The parties have crystallized the issue here in simple fashion, plaintiff stoutly insisting that the just identified affirmative obligation is not a monetary obligation, while defendant says that it is. The problem arises, of course, because it is not stated as a monetary obligation. Essentially for this reason plaintiff argues that it is not a monetary obligation. Yet the plaintiff in discussing the background for the Judgment Entry says that it expected that defendant would generate sufficient funds in his ongoing business to pay for the clean-up. Moreover, we take judicial notice that plaintiff sought discovery with respect to defendant's earnings, the matter dealt with in our Prior Decision, for the purpose of levying upon his wages, a technique which has no application other than in the enforcement of a money judgment. There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U.S.C. § 101 (4), and that defendant owes plaintiff a debt within

the meaning of 11 U.S.C. § 101 (11). Furthermore, we have concluded that that debt is dischargeable.

In order for the debt to be nondischargeable, a provision with respect to it would have to be found within 11 U.S.C. § 523. An examination of that section indicates that it is § 523 (a) (7) which is relevant. There it is provided:

> "§ 523. Exceptions to Discharge.
>
> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt - - -
>
> (7) to the extent such debt is for a fine, penality, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . ."

It must be clear from what we have said above and without further discussion, that the significance to plaintiff of the affirmative obligation of the Judgment Entry is that defendant pay compensation to plaintiff for pecuniary loss, that occasioned by the necessity for the clean up. Discharge of such an obligation is not barred by the provisions of 11 U.S.C. § 523 (a) (7). Plaintiff therefore is not entitled to summary judgment, since it is not entitled to judgment as a matter of law as required by B.R. 756.

In reaching this conclusion we have found the decision *In re Tauscher*, 7 B.R. 918 (B.J., Wis. 1981) in its discussion of § 523 (a) (7) illuminating. In applying that section the court found a distinction between a money penalty which was found to be non-dischargeable, and back wages owed by the defendant which were found to be dischargeable.

Plaintiff with great industry has reviewed the legislative history of the Bankruptcy Code with respect to the definitions of "claim" and "debt", § 101 (4) and § 101 (11), for

the purpose of demonstrating that defendant's affirmative obligation under the Judgment Entry is not a "claim". That review culminates in a formulation by plaintiff that this follows because (1) there is no authority which creates in plaintiff a right to payment as an alternative remedy to debtor's compliance with the injunction of the Judgment Entry; and (2) that debtor's conduct which entitled plaintiff to injunctive relief was a "violation of law" not a "breach of performance" and debtors failure to comply with the injunction was a "contempt of court" not a "breach of performance." An essential part of the argument of the plaintiff is that defendant owes an obligation to plaintiff by reason of the injunction to perform the acts required by the injunction, and it could not substitute for that obligation to the State a payment of money to the State, and in order to qualify as a claim, such a right would have to exist. We are not persuaded by plaintiff's arguments. Plaintiff gives too inflexible a reading to the legislative history. Where, as here, plaintiff has itself treated its rights under the Judgment Entry as a right to payment, and in no way is it suggested that that right amounts to anything other than a right to payment, can we permit a party to hide behind words to avoid the plain thrust of the law.

Plaintiff's analysis of the case cited by defendant, *In re Button,* 8 B.R. 692 (B.J., W.D., N.Y., 1981) is both informative and inappropriate. *Button* held that a restitution order imposed as a condition of probation imposed for a criminal violation is not dischargeable in bankruptcy. Plaintiff urges that we deal with the matter before us in the same manner, as though defendant had been convicted of a crime. The law does not permit us to do that. Plaintiff seems determined to ignore the language of the District Court in its Opinion, Case No. C-1-81-59, April 30, 1981,

(D.C. S.D., Ohio, Western Division), affirming our Prior Decision where Judge Judge [sic] Spiegel said:

> "Finally, the Court is somewhat disturbed by its impression that the State is attempting to punish Mr. Kovacs for not complying with the 1979 Judgment, and in the process is subverting the purpose of the Bankruptcy Code.
>
> • • •
>
> *There are criminal sanctions which the State may invoke against Mr. Kovacs if he has violated environmental protection laws and regulations. The Bankruptcy Code may not be used as a substitute for such criminal sanctions.*" (Emphasis supplied.)

Plaintiff's motion is denied.

So ORDERED.

Dated: February 23, 1982

/s/BURTON PERLMAN
BURTON PERLMAN
U. S. BANKRUPTCY JUDGE

2/23/82 (alc).
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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-82-526

IN RE: WILLIAM LEE KOVACS, dba
B & W ENTERPRISES,

Debtor,

STATE OF OHIO, ex rel
WILLIAM J. BROWN, ATTORNEY
GENERAL OF OHIO,

Plaintiffs-Appellants,

vs.

WILLIAM LEE KOVACS, et al.,

Defendants-Appellees.

OPINION AFFIRMING BANKRUPTCY COURT'S DETERMINATION OF DISCHARGEABILITY

(Filed September 17, 1982)

SPIEGEL, J.:

This matter came before the Court for oral argument on appeal from a determination of dischargeability by Judge Burton Perlman of the United States Bankruptcy Court, Southern District of Ohio, Western Division. Having considered plaintiffs-appellant's brief and reply brief (docs. 2, 4) and defendant-appellees' reply (doc. 3), as

as well as the evidence and the arguments of counsel, we affirm the judgment of the Bankruptcy Court.

At issue is the dischargeability of an injunction obtained as part of a settlement agreement by the State of Ohio. The injunction, entered in the Court of Common Pleas of Butler County, July 18, 1979, required, *inter alia*, defendant Kovacs to remove and dispose of all hazardous materials stored at the Chem-Dyne premises in Hamilton County within one year. *State of Ohio ex rel Brown, et al.* v. *Chem-Dyne Corp., et al.*, Butler County Court of Common Pleas, Case No. CV-76-09-0834. Defendant Kovacs was chief executive officer of Chem-Dyne Corporation which was in the business of disposing of and recycling industrial and hazardous wastes.

Approximately six months after the injunction was entered, the State succeeded in its attempt to have a receiver appointed over the property and assets of, among others, William Kovacs and Chem-Dyne. Subsequently defendant Kovacs filed a petition for relief, initially under the arrangement provisions of Chapter 11 and later by application under the liquidation provisions of Chapter 7 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101 *et seq.* Kovacs was adjudicated bankrupt September 2, 1980.

On September 12, 1980, the State filed a motion in the Butler County Common Pleas Court for a hearing to determine the existence of any further assets of the debtor Kovacs. Defendant Kovacs requested and the Bankruptcy Court granted a stay of these state proceedings pursuant to the automatic stay provisions of 11 U.S.C. § 362. The Bankruptcy Court found that the State's purpose in bringing the state court action was to establish Kovac's post-petition earnings preliminary to seeking an order which would require that part of Kovacs' post-petition earnings be applied to the receiver's efforts to clean up the Chem-

Dyne facility. The State appealed to this Court which affirmed the action of the Bankruptcy Court. The State then appealed to the United States Court of Appeals for the Sixth Circuit which also affirmed, stating, "[w]e further concur with the conclusion of the bankruptcy court and the district court that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs." *In Re Kovacs,* Case No. 81-3320 (June 16, 1982).

In October, 1980 the State sought a declaration from the Bankruptcy Court that the obligation imposed upon Kovacs by the injunction to clean up the Chem-Dyne facilities was not subject to discharge pursuant to 11 U.S.C. § 727 (b). Judge Perlman denied the State's motion for summary judgment, finding the injunction subject to discharge.

In essence, the State's argument is that or[illegible] "claims" or "debts" are dischargeable in bankruptcy pursuant to 11 U.S.C. § 727 (b). "Debt" is defined by the Bankruptcy Reform Act as liability on a claim. 11 U.S.C. § 101 (11). "Claim" is defined as a "right to payment" or a "right to equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101 (4). In an extensive discussion of the legislative history, the State argues that Congress intended to make the dischargeability of rights to equitable remedies turn on the availability of alternative rights to payment. Because, according to the State, Kovacs' failure to comply with the injunction does not give rise to a right to payment under Ohio law, the injunction is not dischargeable (doc. 2). Plaintiff also asserts that the State is not seeking to compel payment from defendant Kovacs but rather to have the Butler County Common Pleas Court establish a new rate of clean-up more commensurate with Kovacs' changed financial condition (doc. 4).

Defendant Kovacs agrees that the key issue in determining whether an obligation under a state court order is a "debt" within the meaning of the dischargeability provisions of the Bankruptcy Act, is whether the debtor's estate can be compelled to pay money in compliance with the order. Defendant argues that the State is estopped from denying that it has no such right. Pointing to the State's motion in the Butler County Common Pleas Court for a hearing to determine Kovacs' post-petition income and employment status, defendant maintains that the State cannot on the one hand seek to compel payment from Kovacs and on the other hand argue that it has no right to such payment (doc. 3).

The Court accepts that the existence of an alternative right to payment determines whether an obligation to perform created by court order is dischargeable pursuant to 11 U.S.C. § 727 (b). *In re Newton,* 15 B.R. 708 (N.D. Ga. 1981); *In Re Button,* 8 B.R. 692 (W.D. N.Y. 1981). We also recognize that defendant has not clearly established that Ohio law provides for an alternative right of payment. Nevertheless, we conclude that, under the law of the case principles, we must accept the determination of the Sixth Circuit that the State was seeking what amounted to a money judgment against Kovacs. *In Re Kovacs, supra.*

Law of the case doctrine embodies the principle that a decision of the appellate court, unless properly set aside, should be followed at subsequent stages of the litigation in the interest of consistency and to avoid reconsideration of matters already settled. Although courts have the power to reconsider issues, *Messenger* v. *Anderson,* 225 U.S. 436, 444 (Holmes, J.), most courts state that reconsideration is justified only where there has been an intervening change in controlling law, new evidence has become available, there is a need to correct an obvious error, or to prevent

manifest injustice. *Petition of United States Steel Corp.*, 479 F.2d 489, 493-494 (6th Cir. 1973) *cert. denied* 414 U.S. 859. Federal district courts should be particularly cautious about ignoring the findings of controlling circuit courts. *Id.* at 493.

We find no cogent reason justifying reconsideration of the Sixth Circuit's determination in *In Re Kovacs, supra.* Plaintiff-appellant has cited to no change in the law or new evidence. Although counsel for plaintiff challenges the correctness of the Sixth Circuit's finding, we are not persuaded that there is error in that court's determination that the State was seeking a money judgment from Kovacs as an alternative to requiring Kovacs personally to perform the obligations imposed by the injunction. If there is error, it is certainly not obvious.

Finally, no injustice will result from our following the law of the case in this instance. On the contrary, the finding that the State was in fact seeking a money judgment from Kovacs and that consequently the injunction is dischargeable pursuant to 11 U.S.C. § 727 (b) is in harmony with the principles of rehabilitation underlying the Bankruptcy Reform Act of 1978. To find that the injunction is not dischargeable would subvert Congress' clear intention to give debtors a fresh start.

The Court, therefore, affirms the decision of the Bankruptcy Court.

So Ordered.

/s/S. ARTHUR SPIEGEL
S. Arthur Spiegel
United States District Judge

Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

CASE NO. 82–815

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a/, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER STATE OF OHIO

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ARGUMENT

I. BECAUSE THERE EXISTS A CONTINUING LIVE CONTROVERSY BETWEEN THE PARTIES CONCERNING WHICH THIS COURT MAY GRANT THE STATE OF OHIO SPECIFIC RELIEF, THIS CASE IS NOT MOOT.

In his brief in opposition to Ohio's petition for certiorari, Respondent Kovacs argues that the State's petition should be denied because the bankruptcy and district courts' recent determinations on Ohio's adversary complaint concerning the dischargeability of the state court injunctions render this case moot. (Kovacs' Br. 4-6)*. In light of the interrelationship between the dischargeability proceeding below and the stay proceeding which is the subject of the petition to this Court, the State is incredulous that Kovacs would make such a blatantly misleading suggestion to this Court. As will be established below, there are three ways in which a live case or controversy clearly still exists between Ohio and Kovacs.

---

*It must be clarified that the bankruptcy court *has not* issued a final discharge of Kovacs thereby terminating the entire bankruptcy case, *In re Kovacs*. Rather, the bankruptcy and district courts have merely ruled on an adversary proceeding within the bankruptcy case. The actual bankruptcy case, *In re Kovacs,* remains pending before the bankruptcy court. Indeed, within the past month Kovacs has filed a new adversary complaint in the bankruptcy court against the state court receiver in which the same issues as in the case at bar will again be present. *See* Supplemental Appendices to this reply brief.

A. Since The District Court's Recent Determination Of Dischargeability Was Based Upon The Sixth Circuit's Decision Which Is The Subject Of Ohio's Petition As "Law Of The Case", There Remains A Live Controversy Because This Court's Granting Of Ohio's Petition And Reversal Of The Sixth Circuit's Decision Below Would Require Reversal Of The District Court's Determination Of Dischargeability.

As Respondent Kovacs argues in his brief in opposition to Ohio's petition, a case is still a live controversy if there exists a "real and substantial controversy admitting of specific relief through a decree of a conclusive character". *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Due to the unique nature of the recent decision of the United States district court that Kovacs' obligation to comply with the state court's injunctions obtained against him by Ohio is dischargeable in bankruptcy, the question framed by Ohio's petition for certiorari remains a live, and, indeed, more vital than ever, controversy between the parties.

Immediately after the bankruptcy court invoked against the State the automatic stay which is the subject of Ohio's petition to this Court, Ohio filed in the bankruptcy court an adversary complaint alleging that the injunctions it had obtained in bankruptcy were not dischargeable because the injunctions were neither "claims" nor "debts" as defined in 11 U.S.C. Section 101(4) and (11) which could be discharged pursuant to 11 U.S.C. Section 727(b). The State claimed that since it had no right to payment as an alternative to the performance of the injunctions, Kovacs' obligation to perform the injunctions did not fit within the definition of "claim" provided at 11 U.S.C. Section 101(4)(B).

The district court, in its recent "opinion affirming bankruptcy court's determination of dischargeability" (attached as Appendix C to Kovacs' Brief In Opposition To Petition For Writ Of Certiorari), seemed to accept the State's argument. The court agreed with Ohio that an alternative right to payment was necessary in order to discharge an equitable obligation. The court further agreed that Kovacs had not established the existence of such an alternative right to payment. Those conclusions by the district court should have resulted in a decision in the State's favor that the injunctions were not dischargeable. The district court, however, went on to declare:

> Nevertheless, we conclude that, *under law of the case principles,* we must accept the determination of the Sixth Circuit that the State was seeking what amounted to a money judgment against Kovacs. *In re Kovacs, supra.* (*See* Resp. Kovacs' Br. at 15(a)).

Thus, the district court held that the Sixth Circuit's previous decision that Ohio was attempting to enforce a money judgment not an injunction was "law of the case" requiring a determination of dischargeability. Since that previous decision of the Sixth Circuit is the very same decision of which Ohio is seeking review by its petition for certiorari, Kovacs' claim that there is no "specific relief which could be granted the Petitioner in the instant case" (Resp. Kovacs' Br. at 6) is clearly incorrect. By granting Ohio's petition and reversing the Sixth Circuit's previous erroneous determination that Ohio is enforcing a money judgment, the law of the case principle would require reversal of the district court's decision holding the injunctions dischargeable. Thus, the State would be free to resume its efforts to enforce the injunctions against Kovacs. Therefore, in light of the "law of the case" basis for the district court's determination of dischargeability, this case is far from moot. Indeed, this case takes on increased importance and vitality because a decision in

this case can have sweeping implications on the dischargeability of Kovacs' obligation to comply with the injunction to abate the environmental catastrophe he created.

B. This Case Still Presents A Live Controversy Because The District Court's Determination Of Dischargeability May Be Reversed By The Sixth Circuit.

On October 4, 1982, the State filed a timely appeal to the Sixth Circuit from the district court's determination of dischargeability. In its brief filed in the Sixth Circuit on December 6, 1982, Ohio has pointed out that it is a well-established rule of law that the "law of the case" doctrine does not apply to all matters which could have been decided in a case but rather is limited strictly to those issues actually decided. *Quern v. Jordan,* 440 U.S. 332, 347, fn. 18 (1979); *Hartford Life Insurance Co. v. Blincoe,* 255 U.S. 129, 136 (1921); *Wells Fargo R. Co. v. Taylor,* 254 U.S. 175 (1920).

In addition, Ohio also has informed the Sixth Circuit that the decisions of all three courts leading up to and including *In re Kovacs,* 681 F.2d 454 (6th Cir. 1982), specifically refused to address the dischargeability issue. The bankruptcy court, when determining that the automatic stay applied against Ohio, clearly stated:

> The State suggests that its effort in the Butler County Common Pleas Court should not or cannot be stayed because the duties of Kovacs arising under the Stipulation and Judgment Entry of July 18, 1979 are non-dischargeable. The State thus brings us to an interface between the stay provisions of the Bankruptcy Code 11 U.S.C. Section 362 and the dischargeability section, 11 U.S.C. Section 523.

> *While we had earlier in our decision accepted for purposes of argument that the State is proceeding on a non-dischargeable obligation, we will not here decide that question on the merits.* Bankruptcy Rule 701(7) expressly provides that the determination of the dischargeability of a debt is to be determined in an adversary proceeding. (Emphasis supplied.) (App. D at A-23-24).

When that decision was appealed to the District Court, the District Court also refused to address the State's non-dischargeability argument:

> In the briefs and on oral argument, there was much discussion of whether the debtor's obligations under the 1979 judgment of the Butler County Common Pleas Court are dischargeable in bankruptcy. *However, a determination of this issue is not necessary to the issue before us.* Both parties at oral argument agreed that a motion to determine dischargeability is pending in the bankruptcy court. (Emphasis supplied.) (App. C at A-14).

Thus, since the "law of the case" doctrine cannot be applied to issues which were not decided in a previous decision and the dischargeability issue was not addressed in any of the decisions leading up to and including *In re Kovacs, supra,* there is a substantial likelihood that the district court's reliance upon that doctrine to justify its determination that the state court injunctions are dischargeable will be reversed. When that happens, the question of the statutory stay which was held to be applicable to Ohio regardless of the dischargeability of Kovacs' obligation to comply with the State court injunc-

tions will still be in issue. Therefore, this case clearly is not moot and the petition should not be denied on the grounds of mootness.

C. The Issue Concerning Whether Ohio Is Attempting To Enforce A Money Judgment Is Capable Of Repetition, Yet Respondent Kovacs Seeks To Employ The Mootness Doctrine To Evade This Court's Review Of That Issue.

Contrary to the claim of Respondent Kovacs on page 6 of his brief that the facts of this case are so unique that there is little likelihood of repetition, the dischargeability decision of the district court below demonstrates that the identical facts and the identical issue of whether Ohio is enforcing a money judgment are at issue in that case. Indeed, as the district court's opinion notes (Kovacs' Br. at 15(a)), Kovacs is making the same "Ohio should be estopped to deny that it is enforcing a money judgment" argument in that case as it made in the present case. Thus, it is appalling that Kovacs would attempt to mislead this Court concerning the likelihood of repetition of the issue when, at the very same time, he is pressing the identical argument based on identical facts in another proceeding.

Furthermore, shortly before Thanksgiving, Kovacs filed an adversary complaint in the bankruptcy court against the receiver appointed in the state court to implement the injunction the State obtained against Kovacs. (*See* Appendix to this reply brief). In that complaint, Kovacs seeks to recover from the receiver many of the assets which the receiver has employed to attempt to complete the Chem-Dyne site cleanup. The same exact issue presented in the case at bar is certain to arise in that case.

Thus, while Kovacs presses in two other proceedings the identical argument he makes in this case based upon the identical facts in this case, he argues in this case that the issue is moot and there is little likelihood that the question will be repeated. Clearly, Kovacs' contention is nothing more than a transparent attempt to evade this Court's review of the error of his position. *Roe v. Wade,* 410 U.S. 113, 125 (1973).

Therefore, since the facts and issue presented by the case at bar are directly at issue in two related adversary proceedings which are still ongoing in the same bankruptcy case, this case is far from moot. There is still a live and vigorous controversy between Ohio and Kovacs. As a result, Kovacs' mootness argument should be rejected.

II. RECENT DECISIONS AND THE AMICUS CURIAE BRIEFS OF SEVENTEEN STATES AND THE SOLICITOR GENERAL OF THE UNITED STATES DEMONSTRATE THAT THIS CASE PRESENTS A SERIOUS QUESTION OF FEDERAL LAW WHICH THIS COURT SHOULD ADDRESS.

Respondent Kovacs' claim that no significant question of federal law is present in this case has a hollow ring in light of the recent developments reflected in the *amicus curiae* briefs from sixteen states and the Solicitor General of the United States.* To the contrary, those recent developments confirm the fears expressed by Ohio in its petition for certiorari. (*See* Petition, p. 13).

*While Pennsylvania's brief lists fourteen other states which have joined it, Ohio has been informed that Colorado intends to file a separate statement with this Court indicating that it joins in Pennsylvania's brief.

In less than six months since the Sixth Circuit's decision in the case at bar, the "mandatory injunctions are really money judgments" rationale of that case has been followed by two other federal courts to the great distress of Pennsylvania, New Hampshire, and the United States.

Indeed, as those recent decisions indicate, if this Court were to acquiesce in the intellectual dishonesty of the Sixth Circuit's decision below, there is virtually no limit to the havoc which bankruptcy courts can wreak upon police power enforcement actions. As even a quick review of the Butler County Court of Common Pleas' July 18, 1979 Stipulation and Judgment Entry discloses, the orders contained therein are injunctions, not a money judgment. Yet, by unlawfully employing the device of estoppel, the courts below have performed an act of judicial alchemy to allegedly transform the injunctions into a money judgment. Once the intellectual dishonesty of calling an elephant a mouse is accepted, it is only a short step to holding states in contempt of the statutory stay and transferring state enforcement actions from state courts to bankruptcy courts as in the *Penn Terra* case or sheltering a corporate giant like Johns-Manville from its obligation to clean up a hazardous asbestos disposal site when there is no other source of funds as the district court of New Hampshire did in the Johns-Manville litigation. More to the point, once the distinction between injunctions and money judgments is obliterated by "judicial interpretation" in the manner below, the entire Congressional intent to limit the statutory stay to those circumstances explicitly defined in the statute is defeated.

As indicated by the states which have joined in the *amicus* brief, the issue presented by this case is important to every geographic region of the country: the West (California); the Mountain States (Idaho, Colorado and New Mexico); the Southwest (Oklahoma); the South (North Carolina and South Carolina); New

England (Vermont and Connecticut); the Middle Atlantic States (New York, Pennsylvania and West Virginia); and the Midwest (Wisconsin, Missouri, Illinois, Indiana and Ohio); and the United States government itself. Seldom have all of these different groups spoken with one voice: the Sixth Circuit's erroneous use of estoppel to transform an injunction into a money judgment is a disaster to police power enforcement efforts and compels this Court's attention.

III. CONTRARY TO KOVACS' MISLEADING FACTUAL ALLEGATIONS, THIS CASE INVOLVES CONTINUING VIOLATIONS OF OHIO LAW AND THUS KOVACS' ATTEMPT TO RECONCILE THE CONFLICT BETWEEN THE DECISION IN THE CASE AT BAR AND A DECISION BY THE FIFTH CIRCUIT IS UNSUCCESSFUL.

Kovacs' brief is permeated by severe factual distortions concerning his claim that there are no continuing violations of state law involved in this case.* Kovacs advances the simplistic notion that since the appointment of the receiver removed him from the control of the Chem-Dyne site, the violations have stopped. While it is true that the appointment of a receiver stopped Kovacs

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*While not directly related to the question of continuing violations, one of Kovacs' grosser distortions is his claim on page 7 of his brief that the record contains no evidence that Kovacs' efforts could be of any benefit to the cleanup effort. The bankruptcy court stayed the hearing in the state court which was intended to determine the extent to which his efforts could assist the receiver. Thus, since the bankruptcy court's stay prevented Ohio from developing such evidence, obviously that evidence is not in the record.

from committing additional future violations by accumulating an increased volume of illegally stored hazardous materials, the appointment of the receiver alone did nothing to abate the continuing violations resulting from Kovacs' past unlawful conduct. Indeed, the uncontroverted testimony offered by the State before the bankruptcy court was directly the opposite of what Kovacs argues to this Court.

The testimony before the bankruptcy court of the expert witnesses from U.S. EPA and Ohio EPA and the state court receiver all concerned conditions on the Chem-Dyne site since the appointment of the receiver and after Kovacs had ceased bringing additional materials on the site. The testimony established: that some of the materials previously brought on the site by Kovacs remained in open pits emitting hazardous air pollution; that a large volume of the materials Kovacs previously brought on-site remained in leaky tanks and drums slowly but surely releasing their hazardous contents to the environment and causing additional water pollution; that other materials remained stored in such a manner as to present a fire hazard and a potential for explosions in the middle of an otherwise residential area. Thus, the whole point of the state court order requiring Kovacs to remove all the materials from the Chem-Dyne site is that their removal was necessary to abate all continuing violations which resulted from Kovacs' previous unlawful conduct.

It is the *continuing* violations at Chem-Dyne which place the Sixth Circuit's holding below squarely in conflict with the Fifth Circuit's decision in *Securities Exchange Commission v. First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981). The Fifth Circuit held that the automatic stay does not apply to interfere with the appointment of a receiver to comply with an injunction abating continuing violations. *Id.* at 437. The Sixth

Circuit's refusal below to allow the State to require Kovacs to assist the receiver in the abatement of the continuing violations resulting from his past unlawful conduct thus creates a direct conflict between the circuits. Therefore, the Court should grant Ohio's petition.

CONCLUSION

Because of the continuing controversy between Kovacs and Ohio concerning whether Ohio is attempting to enforce an injunction rather than a money judgment, this case is not moot. Furthermore, in light of the *amicus* briefs from seventeen other states and the Solicitor General, and in light of recent lower court decisions following the holding below, the question presented concerning the interference by bankruptcy courts with the implementation of mandatory injunctions obtained in police power enforcement actions should be addressed by this Court. Thus, Ohio's petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this reply brief of petitioner State of Ohio were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of _____ _____ to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011, Harry M. Hoffheimer, 900 Tri-State Building, Cincinnati, Ohio 45202, E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202, James D. Morris, Assistant Counsel, Pennsylvania Department of Environmental Resources, Suite 1200, 1315 Walnut Street, Philadelphia, Pennsylvania 19107, The Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530.

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record for Petitioner

SUPPLEMENTAL APPENDICES

APPENDIX 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:

WILLIAM LEE KOVACS, et al.,
Debtor

WILLIAM LEE KOVACS
P. O. Box 2791
Toledo, Ohio 43606

and

MYRNA KOVACS
P. O. Box 2791
Toledo, Ohio 43606
Plaintiffs

v.

JACK A. ZETTLER
15 North Third Street
Hamilton, Ohio 45011
Defendant

Bankruptcy Case No. 1-80-01499
Adversary File No. _____

COMPLAINT FOR TURNOVER ORDER
(11 U.S.C. Sections 323, 542)

1. On July 17, 1980, plaintiff William Lee Kovacs filed a petition seeking relief under Chapter 11 of the United States Bankruptcy Code.

2. On September 2, 1980, the above referenced proceedings were converted pursuant to 11 U.S.C. Section 1112(a) to proceedings for relief under Chapter 7 of the United States Bankruptcy Code.

3. Plaintiff Myrna Kovacs is the spouse of plaintiff William Lee Kovacs.

4. Defendant Jack A. Zettler was appointed receiver of Chem-Dyne Corporation, Spray-Dyne Corporation, Trans Environmental Corporation, K. O. I. Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial Real Estate Company, and William Lee Kovacs pursuant to an order of the Court of Common Pleas of Butler County, Ohio, entered on February 4, 1980.

COUNT I

5. At the time of the filing of plaintiff's petition for relief under the United States Bankruptcy Code, defendant Jack A. Zettler was in possession of various assets of plaintiff William Lee Kovacs, including the following:

(a) the sum of $675.12 represented by check no. 1288 drawn on the account of Chem-Dyne for wages, which check was not honored as the result of defendant's stop payment order;

(b) compensation in an undetermined amount for services rendered by plaintiff William Lee Kovacs to defendant from the date of the order of the Butler County Court of Common Pleas appointing defendant as receiver until February 12, 1980;

(c) variety of technical and personal books, manuscripts and other documents belonging to plaintiff William Lee Kovacs.

6. Defendant has refused to deliver to plaintiff the above enumerated items belonging to plaintiff and the estate of William Lee Kovacs notwithstanding plaintiff's repeated demands for their return.

COUNT II

7. At the time plaintiff filed his petition for relief under the United States Bankruptcy Act, defendant was in possession of various documents required by plaintiff William Lee Kovacs in order to properly prepare his schedules required for his bankruptcy proceeding and, additionally, required by plaintiff William Lee Kovacs for the proper preparation of local, state and federal tax returns, including the following:

(a) a list of all generators of chemical waste located at the Chem-Dyne facilities at 500 Ford Boulevard, Hamilton, Ohio;

(b) a list of all creditors of William Lee Kovacs, Hamilton Industrial Real Estate Company, B & W Enterprises, Whitco Enterprises, Inc., and all other corporations and business entities which had been placed under the receivership of defendant;

(c) copies of financial statements previously provided defendant by plaintiff William Lee Kovacs;

(d) copies of all leases, contracts and other documents evidencing obligations or rights for any of the partnerships, corporations, or William Lee Kovacs, personally, which were placed under the receivership of defendant;

(e) documents concerning all accounts receivable for the partnerships, corporations and personal accounts of William Lee Kovacs, which entities were under the receivership of defendant;

(f) federal Form K-I for all entities covered by the receivership for all years since the date of the defendant's appointment.

8. At the time plaintiff filed his petition for relief under the United States Bankruptcy Act, defendant was in possession of various documents of title of property owned by plaintiff William Lee Kovacs, including titles to real estate and a motorcycle owned by plaintiff William Lee Kovacs.

9. Defendant has refused to provide plaintiff William Lee Kovacs access to or possession of the above referenced documents notwithstanding plaintiff's repeated demands for the same.

COUNT III

10. At the date defendant took over the assets of the various entities for which he was appointed receiver, he took possession of various items of property belonging to plaintiff Myrna Kovacs, including the following:

(a) the assets of Whitco Enterprises, Inc., a corporation wholly owned by plaintiff Myrna Kovacs, which corporation was, by opinion dated October 28, 1981, of the Court of Appeals for the Twelfth Appellate District of Ohio, Butler County, Ohio, improperly and unlawfully included in the receivership;

(b) a desk located on the premises with an approximate value of $1,200.00

(c) wages evidenced by two different checks issued to plaintiff Myrna Kovacs, which checks were not honored due to the stop payment order of defendant Jack A. Zettler and which checks totalled the approximate amount of $120.00;

(d) various documents required to be used by plaintiff Myrna Kovacs in preparing her tax returns, all as alleged in paragraph 7 above.

11. Defendant has refused to provide plaintiff Myrna Kovacs access to or possession of the above referenced documents notwithstanding plaintiff's repeated demands for the same.

WHEREFORE, plaintiffs demand judgment as follows:

(a) on Count I, an order requiring defendant to turnover unto plaintiff the following items: The sum of $675.12 representing wages due plaintiff William Lee Kovacs represented by check No. 1288 drawn on the account of Chem-Dyne, which check was not honored as a result of defendant's stop payment order, compensation in an undetermined amount for services rendered by plaintiff William Lee Kovacs to defendant from the date of the order of the Butler County Court of Common Pleas appointing defendant as receiver until February 12, 1980, and all technical and personal books, manuscripts and other documents belonging to plaintiff William Lee Kovacs;

(b) an order requiring defendant to grant plaintiff William Lee Kovacs access to or possession of all documents enumerated in Count II of the complaint;

(c) an order requiring defendant to turnover to plaintiff Myrna Kovacs the desk and amount of wages

enumerated in Count III of the complaint and to provide an accounting to plaintiff Myrna Kovacs of all assets of Whitco Enterprises, Inc., and to turnover all said assets, or the proceeds from any sale of said assets, to plaintiff, Myrna Kovacs;

(d) for an order granting plaintiffs interest from the date of February 4, 1980, on all monetary items requested to be turnovered to plaintiffs by defendant, for attorney's fees, and for such other relief to which plaintiffs are entitled.

Dated: November 8, 1982.

WOOD, LAMPING, SLUTZ & RECKMAN

By signature deleted
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APPENDIX J

ADDITIONAL RELEVANT PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. Section 101

In this title

* * *

(4) "claim" means

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

* * *

(11) "debt" means liability on a claim;

* * *

11 U.S.C. Section 727

* * *

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of

this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

* * *

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Case No. 82-815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a B & W ENTERPRISES;
HAMILTON INDUSTRIAL REAL ESTATE COMPANY;
RESORT RENTALS; and WHITCO ENTERPRISES,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND FOURTEEN STATES AS AMICI CURIAE

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RECITATION PURSUANT TO RULE 28.4(b) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Because the constitutionality of the Bankruptcy Reform Act, 11 U.S.C. § 101 *et seq.*, an Act of Congress, is drawn in question by the instant brief, and because neither the United States nor any department, office, agency, officer or employee of the United States is a party to this proceeding, 28 U.S.C. § 2403(a) may be applicable and a true and correct copy of the instant brief has been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

In this proceeding from the Sixth Circuit Court of Appeals, a court of the United States as defined by 28 U.S.C. § 451, the Sixth Circuit Court of Appeals has not pursuant to 28 U.S.C. § 2403(a) certified to the Attorney General the fact that the constitutionality of the Bankruptcy Reform Act, 28 U.S.C. § 101 *et seq.*, is drawn in question.

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IN THE

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OCTOBER TERM, 1982

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IN RE: WILLIAM LEE KOVACS,
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STATE OF OHIO,
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v.

WILLIAM LEE KOVACS, d/b/a B & W ENTERPRISES; HAMILTON INDUSTRIAL REAL ESTATE COMPANY; RESORT RENTALS; and WHITCO ENTERPRISES,
Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND FOURTEEN STATES AS AMICI CURIAE

The Commonwealth of Pennsylvania and the states of California, Connecticut, Idaho, Illinois, Indiana, Missouri, New York, New Mexico, North Carolina, Oklahoma, South Carolina, Vermont, West Virginia and Wisconsin file this brief as *amici curiae* pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

THE INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are the Commonwealth of Pennsylvania and the states of California, Connecticut, Idaho, Illinois, Indiana, Missouri, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Vermont, West Virginia and Wisconsin. The common interest of the *amici* in the instant case is in redressing the erosion of their states' police powers by the Sixth Circuit's misapplication of Sections 105 and 362(a) of the Bankruptcy Reform Act, 11 U.S.C. § 105 and 362(a). In essence, the Sixth Circuit's decision will prevent the *amici* from enforcing various state laws concerning environmental protection against bankrupt violators, no matter how great the immediate danger to the public health and safety. As the chief legal officers for their various states, the interests of the *amici* lie in preserving their ability to protect the citizenry through enforcement of various state police power enactments.

SUMMARY OF ARGUMENT

In conflict with the Fifth Circuit Court of Appeals, the Sixth Circuit Court of Appeals has erroneously applied the "automatic" stay under section 362(a) of the Bankruptcy Reform Act, 11 U.S.C. § 362(a), to the State of Ohio, by enjoining an Ohio proceeding against a bankrupt pursuant to a validly enacted police power statute seeking the abatement of the dangers posed by an unlawful hazardous waste disposal operation. Because the Sixth Circuit's decision sanctions continuing environmental harm by the bankrupt, because the Sixth Circuit's reasoning has led to similar untoward decisions in Pennsylvania and New Hampshire and because the Sixth Circuit's decision will prevent the remaining *amici* from enforcing the laws of their states in similar circumstances, the Court should settle the important question of federal law presented by the applicability of section 362(a) now, in the context of the instant case.

The Sixth Circuit's decision also contravenes the Tenth Amendment, 28 U.S.C. § 959(b) and section 543(c) of the Bankruptcy Reform Act, 11 U.S.C. § 543(c). Given the immediate danger to the citizens of Ohio posed by the illegal disposal of hazardous waste, the exercise of this Court's supervisory powers is urgently required to redress this extreme departure from the ordinarily accepted course of judicial proceedings by the Sixth Circuit.

The Sixth Circuit's decision also conflicts with the reasoning of this Court in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S.Ct. 199 (1982), because the Sixth Circuit has sanctioned the exercise of the judicial power of the United States under Article III by an Article I judge. In order to rectify this inconsistency, the Court should hear the instant case.

ARGUMENT

In conflict with the Fifth Circuit Court of Appeals, the Sixth Circuit Court of Appeals has erroneously applied the automatic stay to state police power actions.

In the instant case, the Sixth Circuit has rendered a decision in conflict with that of the Fifth Circuit on the applicability of the "automatic" stay under section 362(a) of the Bankruptcy Reform Act, 11 U.S.C. § 362(a), to regulatory enforcement action by governmental units. In *Securities Exchange Commission v. First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981), the Fifth Circuit ruled that the automatic stay did not apply to an action against a bankrupt by the Securities Exchange Commission seeking injunctive relief and the appointment of a receiver to remedy various securities law violations. As Ohio correctly notes in its Petition for Writ of Certiorari at pages 15-19, there is thus contradictory precedent in the Circuit Courts of Appeal, requiring resolution of the conflict by this Court.

In sanctioning the application of the automatic stay to state police power actions against bankrupt violators of state law, the Sixth Circuit has also decided an important question of federal law which has not been, but

should be, settled by this Court. The practical result of the Sixth Circuit's decision is to afford the bankrupt an absolute protection against a legitimate state enforcement action and to expose the people of Ohio to the continuing imminent danger posed by the illegal disposal of hazardous waste at the Chem-Dyne site.

Moreover, the Sixth Circuit's interpretation and application of section 362(a) has unfortunately been read and will be read by other courts for its suggestive authority. Such use of the Sixth Circuit's reasoning has already occurred, with devastating impact in the Commonwealth of Pennsylvania and in the State of New Hampshire.

In the case of *In re: Penn Terra Limited*, No. 82-845 (Western District of Pennsylvania, Memorandum Opinion, Order and Judgment dated November 4, 1982—a copy of this opinion appears as Appendix A to this brief), the Bankruptcy Court for the Western District of Pennsylvania, held, *inter alia*, that the Commonwealth of Pennsylvania had violated the automatic stay provisions of section 362(a) when it attempted to seek by injunction in the Commonwealth Court of Pennsylvania the enforcement of an administrative order requiring reclamation of an unlawful strip mine operation. Based upon the reasoning of the Sixth Circuit in the instant case, the bankruptcy court stripped Pennsylvania's Commonwealth Court of jurisdiction despite the requirements of 28 U.S.C. § 1478(a), adjudicated the Commonwealth in contempt, fined the Commonwealth and enjoined the Commonwealth from taking any of the steps necessary to protect its citizens from the legislatively determined [1] dangers posed by the unlawful strip mine operation.

In the case of *United States, et al. v. Johns-Manville Sales Corporation, et al.*, Civil Action No. 81-299-D (District of New Hampshire, Order dated November 15,

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[1] *See, e.g.*, section 1 of Pennsylvania's Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 (Cumulative Annual Pocket Part 1982-1983).

1982—a copy of this order appears as Appendix B to this brief), the United States District Court for the District of New Hampshire affirmed a magistrate's ruling that both the United States and the plaintiff-intervenor State of New Hampshire were enjoined from proceeding with an action seeking an injunction against the allowance or causation of disposal of asbestos and other hazardous wastes and substances by the Johns-Manville Sales Corporation, which is currently the subject of proceedings pursuant to Chapter 11 of the Bankruptcy Reform Act. Again, the district Court cited with approval the Sixth Circuit's decision in the instant case. Just as in the cases of Ohio and Pennsylvania, New Hampshire (and the government of the United States) are prohibited by the federal courts pursuant to section 362(a) from enforcing laws designed to protect the public health, safety and welfare.

The applicability of the automatic stay to such state court police power and federal regulatory proceedings is an important question of federal law which has been decided by the Sixth Circuit in conflict with a decision by the Fifth Circuit. This Court has not yet decided the question. In order to redress the continuing environmental harm sanctioned by the Sixth Circuit's decision in Ohio, as followed in Pennsylvania and New Hampshire, the Court should resolve the conflict in the circuits and settle this important question of federal law as swiftly as possible, in the context of the instant case.

The decision of the Sixth Circuit Court of Appeals will prevent the *amici* and the State of Ohio from protecting their citizens from the hazards caused by violations of state police power enactments by bankrupts despite the requirements of the Tenth Amendment, 28 U.S.C. § 959(b) and 11 U.S.C. § 543(c)(1).

Tenth Amendment

State regulatory agencies throughout the nation are faced every day with the urgent need to protect their

citizens from both the immediate dangers posed by the illegal disposal of hazardous and industrial waste, as in the instant case, and by violations of the other state statutes[2] designed to protect the health, safety and welfare of the public. All such statutes represent valid exercises of the police power, reserved to the states under the Tenth Amendment to the United States Constitution. Traditionally recognized by this Court as the least limitable of the reserved powers, *Queenside Hills Realty v. Saxl*, 328 U.S. 80 (1946), the police power broadly authorizes the various states to regulate in order to protect the public health, safety and welfare.

However, legitimate state enforcement action to protect the public health, safety and welfare is thwarted when illegal activities are sanctioned by the federal bankruptcy courts. The instant case illustrates the refusal of the federal bankruptcy courts to show constitutionally mandated deference towards the states in the exercise of their police power.

In direct contravention of validly enacted state regulatory requirements, bankruptcy courts throughout the nation have sanctioned such activities as the illegal operation of highly polluting strip mines,[3] the unlicensed operation of unqualified hospitals[4] and preventing the

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[2] With respect to the example of Pennsylvania alone, *see, e.g.*, the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*; the Clean Streams Law, 35 P.S. § 691.1 *et seq.*; the Air Pollution Control Act, 35 P.S. § 4018 *et seq.*; the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 *et seq.*; the Coal Refuse Disposal Control Act, 52 P.S. § 30.51 *et seq.*; and the Bituminous Subsidence and Land Conservation Act, 52 P.S. 1406.1 *et seq.*

[3] *In re: Reddale Company, Inc., Reddale Resources, Inc., E. C. Dean Contractor, Inc.*, Nos. 79-330, 79-331, 79-332 (Bankruptcy Court, W.D. Pa.) Memorandum Opinion and Order, March 31, 1980.

[4] *In re: Saugus General Hospital, Inc.*, 4 BCD 1160, 19 CBC 651, 1 CBC2d 26 (D. Mass. 1978).

cleanup of a hazardous asbestos disposal facility.[5] The most recent incursions by the federal bankruptcy courts against state police power statutes and the Tenth Amendment occurred on November 4, 1982, when the Bankruptcy Court for the Western District of Pennsylvania adjudicated the Commonwealth of Pennsylvania in contempt and levied a substantial fine because the Commonwealth sought in the courts of Pennsylvania an injunction enforcing an administrative order pursuant to Pennsylvania law to abate the hazardous conditions created by an illegal and dangerous strip mine operated by a bankrupt,[6] and on November 15, 1982, when the State of New Hampshire and the government of the United States were enjoined from proceeding with an injunctive action seeking the cleanup of an unlawful asbestos disposal operation.[7]

The foregoing examples are by no means exhaustive. The federal bankruptcy courts have delayed, obstructed and thwarted the states in their various efforts pursuant to the police power to protect the public health, safety and welfare against the illegal operation of hazardous enterprises, despite the restraints of the Tenth Amendment. Many of these police power statutes, moreover, have been enacted to implement federal legislative action under the Commerce Clause.[8] Consequently, when the enforcement of these statutes is enjoined by the federal bankruptcy courts, it disrupts the constitutional scheme protecting

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[5] *United States, et al. v. Johns-Manville Sales Corporation, et al.*, Civil No. 81-299-D (D. New Hampshire 1982).

[6] *In re: Penn Terra Limited*, No. 82-845 (Bankruptcy Court W.D. Pa.) Memorandum Opinion, Order and Judgment, November 4, 1982).

[7] *See* n.5, *supra*.

[8] *See, e.g.*, the Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the Surface Mining Control and Reclamation Act, 30 U.S.C. 1201 *et seq.* *See also* Wein,

both the police power of the states and the power of the federal government to regulate interstate commerce. This disruption of our constitutional scheme of government demands the invocation of this Court's supervisory powers.

The Bankruptcy Reform Act

The Congress recognized and acknowledged the states' police power when it enacted the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.* The Act makes it clear that bankrupts and bankruptcy courts may not frustrate nor obstruct the legitimate enforcement by the states of validly enacted police power statutes, in the explicit declaration that the automatic stay under Section 362 of the Act, 11 U.S.C. § 362, does not apply to that class of actions. 11 U.S.C. § 362(b)(4):

> [t]he filing of a petition under section 301, 302 or 303 of this title does not operate as a stay . . . under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.[9]

The Sixth Circuit has ignored this express policy choice by the Congress and this constitutionally mandated provision of the Bankruptcy Reform Act. Ohio stands unable to protect its citizens against the depredations of Kovacs, who by virtue of the Bankruptcy Court's action, affirmed by the Sixth Circuit, is completely insulated from his duties under the Stipulation and Judgment of July 18, 1979. If the Sixth Circuit's decision is permitted to

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Environmental Regulation and the Bankruptcy Act, 17 Duq. L. Rev. 133, 136 (1978-1979).

[9] Indeed, as Ohio correctly states in its Petition for Writ of Certiorari at pages 8-11, the legislative history of this provision forcefully underscores Congressional intent to protect state police power actions from interference by the federal bankruptcy courts.

stand, the *amici* will find themselves in the same position as Ohio: prevented from enforcing the valid laws of their states enacted pursuant to their police power because the federal bankruptcy courts have and will prevent them from so doing. Pennsylvania and New Hampshire have already suffered that fate.[10]

The Sixth Circuit has also rendered an implicit decision on the applicability of § 543(c)(1) of the Bankruptcy Code, 11 U.S.C. § 543(c)(1), which provides in pertinent part that "[t]he court, after notice and a hearing, shall . . . protect all entities to which a custodian has become obligated with respect to" property turned over to the bankruptcy court, 11 U.S.C. § 543(c)(1). The Ohio receivership was set up on February 4, 1980, and the bankruptcy was filed on July 18, 1980. When the Ohio receiver, as a "custodian" under 11 U.S.C. § 543, turned over the state receivership assets to the bankruptcy court, no effort whatsoever was made by the bankruptcy court to protect Ohio from the receiver's inability to carry out his obligations under the February 4, 1980 receivership order. To date, those obligations remain outstanding and unsatisfied. The "entity" to which the receiver is obligated for the clean up of the Kovac's hazardous waste dump—the State of Ohio—was not in any sense "protected" by the Bankruptcy court or the Sixth Circuit, despite the clear requirements of § 543(c)(1).

The productive use of state court receiverships in police power matters will inevitably be curtailed, with a concomitant increase in danger to the public health and safety, if neither the receiver nor the state to which the receiver is obligated will be protected by the federal bankruptcy courts. The Sixth Circuit has essentially decided that § 543(c)(1) of the Bankruptcy Code has no applicability to such situations. Such a fundamental dis-

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[10] *See text accompanying* n.5 and n.6, *supra*.

mantling of the Bankruptcy Reform Act and thwarting of the Congressional intent to protect the police power demands the exercise of this Court's supervisory powers.

28 U.S.C. § 959(b)

Even prior to the enactment of the Bankruptcy Reform Act, the Congress recognized its obligation to the states under the Tenth Amendment. Many years ago, the Congress addressed the problems presented when a bankrupt violates state law, in the enactment of 28 U.S.C. § 959(b), which provides in pertinent part that:

> . . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, according to the requirements of the valid laws of the state in which the property is situated, in the same manner that the owner or possessor thereof would be bound to do so if in possession thereof.

This Court upheld the applicability of this provision in *Gillis v. California*, 293 U.S. 62 (1934). The Sixth Circuit's decision ignores this Court's decision in *Gillis* and subverts the Congressional intent to vindicate the states' reserved police power under the Tenth Amendment. Such a radical departure from the ordinary and accepted course of judicial proceedings requires the exercise of this Court's supervisory powers.

In conflict with the decision of this Court in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S. Ct. 199, the Sixth Circuit has sanctioned the exercise of the judicial power of the United States under Article III of the Constitution by an Article I judge.

The plurality opinion in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S. Ct. 199, expressed the gravest reservations over the con-

stitutionality of the grant of jurisdiction to the bankruptcy judges under § 241(a) of the Bankruptcy Reform Act, 28 U.S.C. § 1471. The judgment of the Court was that the exercise by bankruptcy judges of jurisdiction over disputes of a purely state law nature violated Article III of the United States Constitution. The exercise of jurisdiction by the bankruptcy court below, affirmed by the Sixth Circuit, illustrates with precision the reasons why the bankruptcy courts should not be permitted Article III powers.

The day-to-day administration of the affairs of the bankrupt respecting property of the bankrupt in the actual or constructive possession of the federal bankruptcy courts may well be sanctioned under Article I, and a Congressional judgment that the federal bankruptcy courts, as a matter of social policy, possess a sufficient expertise to deal with such affairs might be justifiable. However, the exercise of the judicial power of the United States under Article III by the federal bankruptcy courts cannot be justified. An Article I tribunal has no legitimate business in interfering with a state agency's effort to protect the public health, safety and welfare by enforcing state law in state court against bankrupt violators.

The Congressional grant of All Writs powers to the federal bankruptcy courts pursuant to Section 105 of the Bankruptcy Reform Act, 11 U.S.C. § 105, is constitutionally deficient. In the instant case, Ohio presses in behalf of its citizens a legitimate police power action to abate the dangers posed by illegal hazardous waste disposal by the bankrupt, in a state action sanctioned under the Tenth Amendment. Ohio's police power is as "independent of and antecedent to the reorganization petition that conferred jurisdiction upon the bankruptcy court", *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S. Ct. 199 (1982) as the private dispute in *Northern Pipeline*. Yet, just as in *Northern Pipeline Construction, supra*, in the instant case an

Article I judge exercised and continues to exercise in an improper manner yet another Article III power: the power to issue all writs and orders "necessary or appropriate" in support of the jurisdiction granted it under § 241 of the Bankruptcy Reform Act, 28 U.S.C. 1471, which includes the power to enjoin any person from proceeding with any action on any theory in any court of the various states or the United States against the bankrupt. In Pennsylvania, based upon the reasoning of the Sixth Circuit in the instant case, a bankruptcy court has sanctioned the improper removal of a pending state court enforcement action, adjudicated Pennsylvania in contempt, fined Pennsylvania, and applied the automatic stay in such a manner as to enjoin Pennsylvania from proceeding with a valid state court action seeking to eliminate the dangerous conditions caused by an unlawful strip mine operation.[11] In New Hampshire, based again on the reasoning of the Sixth Circuit, the State of New Hampshire and the government of the United States have been enjoined from seeking an injunction to compel the cleanup of an unlawful asbestos disposal operation.[12] More disasterous examples of the vice in the exercise of Article III powers by an Article I judge are difficult to imagine.

Combining the clear conflict with this Court's plurality opinion in *Northern Pipeline*, *supra*, together with the disregard of the public health and safety and the violations of the Tenth Amendment, 28 U.S.C. § 959(b) and Section 543(c)(3) of the Bankruptcy Reform Act, the invocation of the supervisory power of this Court is urgently required to redress the injustice and peril to the public caused by the Sixth Circuit's decision below.

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[11] The bankruptcy court held that 28 U.S.C. § 1478 did not deprive it of removal power despite the express language of that provision and also held that the automatic stay applied to the Pennsylvania action. *See also text accompanying* n.6, *supra*.

[12] *See text accompanying* n.5, *supra*.

CONCLUSION

In conflict with the Fifth Circuit Court of Appeals, the Sixth Circuit Court of Appeals has erroneously applied the automatic stay of section 362(a) of the Bankruptcy Reform Act to state governments exercising their police power. Because the Sixth Circuit's decision sanctions continuing environmental harm and danger to the people of Ohio, because the Sixth Circuit's reasoning has led to similar decisions in Pennsylvania and New Hampshire, and because the Sixth Circuit's decision will frustrate the efforts of the remaining *amici curiae* as they attempt to resolve closely similar cases as they arise in their own states, the Court should settle this important question of federal law now, in the context of the instant case.

The Sixth Circuit's decision also violates the Tenth Amendment, 28 U.S.C. § 959(b) and section 543(c) of the Bankruptcy Reform Act, 11 U.S.C. § 543(c) and sanctions on a nationwide basis the extreme departure by the federal bankruptcy courts from the ordinarily accepted course of judicial proceedings. Given the immediate and continuing danger to the health and safety of the citizens of the several states, the exercise of this Court's supervisory powers is urgently needed.

The Sixth Circuit's decision also conflicts with the reasoning of the majority of this Court in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 103 S.Ct. 199 (1982), because the Sixth Circuit has sanctioned the exercise of the judicial power under Article III by an Article I judge who possesses neither the attribute of life tenure nor protection against salary diminution. In order to rectify this gross inconsistency with the *Northern Pipeline* judgment, the Court should hear this case.

For these reasons, the *amici* respectfully request that this Court grant a writ of certiorari to review the

judgment of the United States Court of Appeals for the Sixth Circuit in this matter.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES, COMMONWEALTH OF PENNSYLVANIA, PATTI J. SAUNDERS & DIANA J. STARES,

Defendants

MEMORANDUM OPINION

The matter presently before the Court is a Petition for Contempt filed on behalf of debtor, Penn Terra Limited, against the Commonwealth of Pennsylvania Department of Environmental Resources, hereinafter "DER". The Petition for Contempt arises from DER's continued pursuit of a mandatory injunction against debtor in Commonwealth Court of Pennsylvania seeking debtor's expenditure of funds for correction of its violations of the Pennsylvania Clean Streams Act and Surface Mining Conservation and Reclamation Act. DER initiated the action in Commonwealth Court subsequent to the debtor's filing of a petition under Chapter 7 of the Bankruptcy Code; and pursued the litigation despite its receipt of the trustee in bankruptcy's petition to remove the action

from Commonwealth Court to Bankruptcy Court. The Commonwealth Court proceeding ultimately resulted in that Court's entry of an order requiring the debtor to expend funds for correction of its violations.

At the June 29, 1982 hearing on the Petition for Contempt, this Court dismissed the contempt proceedings against Diana J. Stares and Patti J. Saunders, counsel for DER. The Petition for Removal was remanded to Commonwealth Court as to Harvey Taylor, alleged president of debtor corporation; and retained as to Penn Terra Limited, debtor herein. DER was enjoined from enforcing the order of the Commonwealth Court of Pennsylvania entered against debtor and Margaret L. McArdle, trustee, pending determination of the aforesaid matter.

The serious issues presented for determination involve the applicability of the automatic stay provisions of 11 U.S.C. § 362, and removal provisions of 28 U.S.C. 1478 to the action brought by DER against debtor in Commonwealth Court.

DER contends that it is neither subject to the automatic stay provisions nor the removal provisions, for it is a governmental unit proceeding to enforce its police and regulatory powers. Based upon the facts, legislative history, and case law that follow, the Court concludes that there is no sensible basis for its position. For the reasons set forth below, the Court holds that the action initiated by DER in Commonwealth Court wherein a mandatory injunction requiring debtor's expenditure of funds was sought is in essence an attempt to enforce a money judgment. As such, it is not exempt from the automatic stay provisions of § 362 of the Bankruptcy Code. Nor is it exempt from removal under 28 U.S.C. 1478.

The facts are as follows. Penn Terra Ltd. is a Pennsylvania corporation engaged in contract coal stripping.

It filed a voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Code on March 15, 1982. Debtor had ceased all operations prior to that date. On Schedule B-2, debtor lists personal property in the approximate amount of $14,000, $13,500 of which is designated as "certificates of deposit on deposit with DER; bonds for backfilling." The schedules further note that the cost of reclamation vastly exceeds the market and book value of the bonds. Debts listed on the schedules exceed $660,000.

In November, 1981, prior to the filing of the bankruptcy petition, DER, Penn Terra Ltd., and Harvey Taylor, its president, executed a consent order and agreement arising from Penn Terra's violation of the Clean Streams Law (Act of June 22, 1937, P. L. 1987, as amended 35 P.S. § 691.1 *et* seq.); the Surface Mining Conservation and Reclamation Act, (Act of May 31, 1945, P.L. 1198 as amended 52 P.S. § 1396.1 *et* seq.); and Mining and Mine Drainage Permits. Among the various violations cited therein are the following: mining off bonded area; failure to maintain adequate backfilling equipment; failure to maintain adequate erosion and sedimentation controls; failure to pump pit water accumulations; failure to properly treat mine drainage; storage of top strata over gas lines; and failure to seal a deep mine pit. The consent agreement required Penn Terra to complete all backfilling by operating one D-8 bulldozer or its equivalent, and one tractor scraper for eight hours a day, five days a week until reclamation of said mines was completed. Penn Terra was also required to submit soil erosion and sedimentation control plans; implement the same upon approval of DER; dewater all pits; restore and revegetate original contour; seal deep mine entry; submit plans for removal of top strata stored over gas line; and implement said plan upon DER approval. The agreement provided that failure to restore said mines by the date specified therein

would result in Penn Terra's rebonding of the entire area.

On April 14, 1982, approximately one month subsequent to the commencement of the bankruptcy proceedings, DER filed a complaint in equity against debtor at No. 838 C.D. 1982. DER did not receive notice of the bankruptcy petition until April 29, 1982. Included in the various counts of the complaint were the following: I) failure to comply with the consent order and agreement; II) mining off permitted area; III) failure to backfill concurrently with mining; IV) failure to maintain adequate backfilling equipment on the site; V) failure to revegetate affected areas; VI) failure to seal a deep mine opening; VII) storage of top soil over gas line; and VIII) mining within 100 feet of stream barrier.

On April 27, 1982, the Commonwealth Court set the hearing on DER's complaint for May 24, 1982. Immediately prior to the May hearing date, the Trustee in bankruptcy filed a petition for removal of the complaint in equity from the Commonwealth Court to the Bankruptcy Court. Trustee alleges therein that the Bankruptcy Court has exclusive jurisdiction of all matters which deal with assests of the debtor; and over all injunctions which require future use, distribution, or expenditure of debtor's funds.

On May 21, 1982, the petition for removal was personally served upon DER and Diana J. Stares, Esq. by counsel for the debtor. A copy of the petition was mailed to the Commonwealth on the same date. Nonetheless, Diana J. Stares and Patti J. Saunders appeared at the May 24, 1982 Commonwealth Court hearing on behalf of DER to request that the Court issue a preliminary injunction against Penn Terra Ltd. and Harvey Taylor to enforce the terms of the November 1981 consent agreement. During the Commonwealth Court proceeding, Ms. Stares informed the Court that although she

was in receipt of the petition for removal, she was uncertain as to its effect upon the corporate defendant's liability. Penn Terra did not appear at the hearing, nor did counsel appear on its behalf. Ms. Stares continued in the presentation of DER's case, and extensive testimony was offered on DER's behalf. The Commonwealth Court filed a Memorandum Opinion and Order wherein relief requested was granted with respect to the corporate defendant. By order of Commonwealth Court of May 24, 1982, Penn Terra was ordered to perform the following: 1) by October 15, 1982, complete all backfilling and final grading at the Hilty Surface Mine; 2) within fifteen days of the date of order, submit erosion and sedimentation plans, 3) within fifteen days, seal the deep mine opening; submit plans for removal of all strata stored over gas line; and effectuate such plan upon approval from DER. All top soil spreading, mulching, and seeding was to be completed no later than October 15, 1982.

On May 27, 1982, Counsel for the debtor filed a petition for contempt against DER, Diana J. Stares and Patti J. Saunders. Therein, Counsel for the debtor alleges that DER proceeded with the application for preliminary injunction in Commonwealth Court in disregard of the trustee's petition to remove the action to the Bankruptcy Court.

At the June 29, 1982 hearing on the petition for contempt, said petition was dismissed as to individuals Diana J. Stares and Patti J. Saunders. The petition for removal as to Harvey Taylor was remanded to the Commonwealth Court; and the petition for removal as to Penn Terra was retained. This Court further ordered that DER be enjoined from enforcing the May 24, 1982 Order from the Commonwealth Court pending final determination of the aforesaid matter.

In its brief, DER argues that under 11 U.S.C. § 362(b)(4), the filing of a bankruptcy petition does not

operate as a stay of a governmental unit's proceeding to enforce its police or regulatory power. DER further avers that under 28 U.S.C. § 1478, the power to remove does not extend to a civil action by a governmental unit to enforce police powers; and as such, the attempted removal is a nullity. Finally, DER asserts that since it is subject to neither the automatic stay provisions of § 362, nor the removal provisions of § 1478, the Bankruptcy Court is presently without jurisdiction over the action brought by DER in Commonwealth Court.

On the other hand, debtor argues that a mandatory injunction requiring debtor to expend funds is in essence an action by a regulatory agency for the enforcement of a money judgment; and as such, DER's action is subject to the automatic stay. Debtor further argues that DER cannot elect to disregard a removal petition, but rather must litigate its effect before the Bankruptcy Court. For the reasons set forth below, the Court agrees.

Section 362(b)(4) of the Bankruptcy Code provides as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

The legislative history of § 362(b)(4) further provides: "Where a governmental unit is suing a debtor to prevent or stop violation of a fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or atempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." House Report No. 95-595, 95th Cong. 2d Sess. at 343 (1977).

Section 362(b)(4) has been the subject of numerous recent decisions. In various situations, the Courts have upheld a governmental unit's action against a debtor as valid exercise of police or regulatory power. As such, it is exempt from the automatic stay provisions of § 362. The United States Bankruptcy Appellate Panels of the Ninth Circuit recently held that a proceeding initiated by the State of California for purposes of examining the conduct of debtor physician charged with gross negligence was a valid exercise of police power necessary for the health and safety of its residents. Accordingly, the exemption from the automatic stay provisions set forth in 362(b)(4) was applicable. *In re Thomassen*, 15 B R 907 (9 Cir. Bkrtcy. App. 1981). *In NLRB v. Evans Plumbing Co.* 639 F.2d 291 (5th Cir. 1981) a National Labor Relations Board's petition for summary judgment to enforce a Board's decision ordering debtor's reinstatement of two employees who were discriminatorily discharged fell within the § 362(b)(4) exception to the automatic stay, although the NLRB's actions were subject to certain limitations discussed below. In *In re Tauscher*, 7 B R 918, 7 BCD 124, 3 CBC 2d 536 (E. D. Wisc. 1981), the actions by the Secretary of Labor in assessing civil money penalties against debtor for violation of child labor laws was excepted from the automatic stay. The Secretary was permitted to fix penalties, up to and including the entry of a money judgment. Similarly, the administration of worker's compensation claims by the State of Ohio is a valid exercise of a governmental unit's regulatory power, and is exempt from the automatic stay. *In re Mansfield Tire and Rubber Co.* 660 F.2d 1108 (6th Cir. 1981).

Although Congress has provided an exemption from the automatic stay for governmental proceedings in the exercise of police or regulatory power, the legislative history indicates that the exception must be narrowly construed.

> This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the health and safety and not to apply to actions by a governmental unit to protect the pecuniary interest in the property of the debtor or property of the estate. (124 Congressional Record H 11089, 11 U.S. Code Congressional Administrative News 660-61 [December, 1978]).

In line with the narrow construction, some governmental actions have not been excepted from the provisions of the automatic stay. Thus, the Commissioner of Motor Vehicles, who is authorized by statute to suspend the license of an uninsured motorist involved in a motor vehicle accident unless sufficient security is provided, is subject to the automatic stay. The Court concludes: "if the focus of the police power is directed at the debtor's financial obligations rather than the state's health and safety concerns, the automatic stay is applicable." *In re Sampson*, 17 BR 528, 530, 8 BCD 992 (D. Conn. 1982). A housing authority's action to seek eviction of a tenant for nonpayment of rent is also subject to the automatic stay. *In Matter of Gibbs* 7 BCD 445 (D. Conn. 1981). Similarly, an action by a state public health agency to terminate debtor hospital's operating license violated the automatic stay. Although the case was decided under the Bankruptcy Act, the Court states that the same result would follow under the Code. *In re Saugus General Hospital, Inc.* 4 BCD 1160, 19 CBC 651, 1 CBC 2d 26 (D. Mass. 1978). A state health department's action to forfeit debtor hospital's exemption for certificate of need review in the construction of a new hospital facility is also subject to the automatic stay, for the § 362(b)(4) exception is narrow, and applies only to those actions necessary for the protection of public health and safety. *In re King Memorial Hospital, Inc.* 4 BR 704, 6 BCD 634, 2 CBC 2d 639 (S.D. Fla. 1980).

Thus, it is clear that the Courts have reached different results in determining whether various governmental actions fall within the exceptions to the automatic stay set forth in § 362(b)(4). However, on the basis of § 362(b)(5), the Courts are in agreement that the enforcement of a money judgment by a governmental unit is impermissible. Section 362(b)(5) provides as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

The legislative history further provides:

> Paragraph 5 makes clear that the exception extends to permit the entry of a money judgment, but does not extend to permit the enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.
>
> House Report No. 95-595, 95th Cong., 2d Sess. at 343 (1977).

Thus, in recent decisions the Courts have restrained the state's attempted enforcement of a money judgment. *In re Fintel*, 10 BR 50, 7 BCD 531 (D. Ore. 1981); *In re Barber*, 13 BR 962, 8 BCD 188, 5 CBC 2d 150 (N.D. Tex. 1981). As previously stated, in *NLRB v. Evans Plumbing*, *supra*, the Fifth Circuit permitted the entry of a judgment for injunctive relief and for back

pay. However, the Court expressly refrained from ruling upon whether an action to enforce a money judgment would be exempt from the stay. Further, although the Secretary of Labor may fix penalties for the debtor's violation of child labor laws, the enforcement of a money judgment is stayed. *In re Tauscher, supra.* The Commonwealth of Pennsylvania's attempt to enforce a money judgment against debtor for violation of unfair trade practices law is also stayed. *In re Flick,* 14 BR 912, 5 CBC 2d 494 (E. D. Pa. 1981).

Of particular interest in resolution of the case at bar is the recent Sixth Circuit decision of *In re William Lee Kovacs* 681 F.2d 454 (6th Cir. 1982). Therein, debtor, engaged in the business of waste disposal, was sued by the State of Ohio on the basis of its water pollution. Debtor signed a stipulation and judgment entry in the Common Pleas Court of Ohio wherein he was enjoined from further pollution and required to remove industrial waste from the specified site within twelve months. As a result of debtor's noncompliance, a receiver was appointed and directed to correct the violations. Debtor filed a petition under Chapter 11 of the Bankruptcy Code in the Southern District of Ohio in July, 1980. The case was converted to a Chapter 7 in September, 1980. The state of Ohio filed a motion in Common Pleas Court for a hearing to determine debtor's employment status and income. In response thereto, debtor sought to restrain the Ohio state court proceedings. The Bankruptcy Court held that the action by the state of Ohio was not exempt from the automatic stay of § 362(a)(2). As stated by the Bankruptcy Court: "There is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him." (p. 456) In affirming the opinion of the Bankruptcy Court and District Court, the Sixth Circuit reiterates that a governmental unit is denied the power to collect money in their enforcement efforts. "We further concur with the conclusion

of the bankruptcy court and the district court that the state of Ohio, in its state court proceeding, was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay." (p. 456)

This Court adopts the reasoning set forth in *In re Kovacs*, and reaches a similar conclusion in the case at bar. Although DER characterizes its action as a governmental action in the exercise of its police or regulatory powers, it seeks a mandatory injunction requiring the debtor's expenditure of funds for the correction of violations. This Court concludes that the mandatory injunction sought by DER requiring the debtor's expenditure of funds is in essence the attempted enforcement of a money judgment. As such, it is subject to the automatic stay by virtue of § 362(b)(5).

Assuming arguendo that the governmental action in the case at bar was not stayed by § 362 of the Code, § 105 gives the Court broad powers to "issue any order, process or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code." Further, where government regulatory proceedings threaten assets of the debtor's estate, the Court can, in its discretion, impose a stay. *Matter of Shippers Interstate Service, Inc.* 618 F.2d 9 (6 Cir. 1980).

Having concluded that DER's action in the case at bar was subject to the automatic stay, the Court now turns to the issue of removal. DER argues that on the basis of 28 U.S.C. 1478, its action was not subject to removal. It further argues that since the removal was unauthorized, it is of no effect, and the Bankruptcy Court is presently without jurisdiction over the case at bar.

The Court first examines the general principles of removal. An order removing an action to federal court holds the state court's jurisdiction in abeyance until the action is terminated or remanded to state court. *Doerr v.*

Warner, 247 Minn. 98, 76 N.W. 2d 505 (1956), cert. dismd. *Warner v. Doerr*, 352 U.S. 801 (1956). Any further proceeding in state court is a nullity unless the case is remanded. *Hopson v. North American Co.* 71 Idaho 461, 233 P.2d 799 (1951). If necessary the federal tribunal may issue an injunction to prevent further activity in the state court. *Lowe v. Jacobs*, 243 F.2d 432 (5th Cir. 1957), cert. den. *Lowe v. Jacobs* 355 U.S. 842 (1957).

Now turning to the removal statute as it appears in the Bankruptcy Code, 28 U.S.C. § 1478 provides as follows:

> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power to the bankruptcy court for the district where such civil action is pending if the bankruptcy courts have jurisdiction over such claims or cause of action.

As previously determined, DER's action is in essence the attempted enforcement of a money judgment against the debtor. As such, it cannot accurately be characterized as a "civil action by a governmental unit to enforce such governmental unit's police power or regulatory power." Moreover, it is clearly not the type of action Congress intended to bar from removal to the Bankruptcy Court. As stated by the Eighth Circuit in *State of Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981):

> In light of the legislative history and court decisions under the earlier bankruptcy act, we believe that the term "regulatory or police powers" refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that

> directly conflict with the control of the res or property. (p. 776).

For the reasons that follow, the Court concludes that DER's action in the case at bar is of necessity removable to the Bankruptcy Court. As of the commencement of a bankruptcy action, the Bankruptcy Court acquires exclusive jurisdiction over all property wherever located of the debtor. 28 U.S.C. § 1471(e). The underlying goals are efficiency of administration and equality of distribution to creditors. A governmental unit's enforcement of a monetary judgment would give the governmental unit an unfair advantage over other creditors and would effectively subvert the scheme of priorities set forth in § 507 of the Code. Collier on Bankruptcy, 362.05 at 362-40 (15th Ed. 1982). To bar removal of such an action under the guise that it is a governmental action in the enforcement of its police or regulatory power is to effectively thwart the bankruptcy court's exclusive jurisdiction over property of the debtor.

In response to DER's argument that this Court is without jurisdiction in the matter at bar, it is clear that the Bankruptcy Court has jurisdiction to consider a governmental unit's activity which affects the assets of the debtor. *In re Mason*, 18 BR 817, 8 BCD 1251 (W.D. Tenn. 1982). Moreover, the bankruptcy removal statute is a federal statute, and federal law governs its interpretation. *In re Tidwell*, 4 BR 100, 6 BCD 2d 172 (N.D. Tex. 1980). As stated in Moore's Federal Practice:

> Jurisdiction of the federal courts attaches when the removal petition is filed with the state court. The state court is deprived of juridiction to proceed with the removal action unless or until remanded, irrespective of whether the action is removable, which is a question for the federal court.
>
> Vol. 1A 0.168[3-8].

As a final note, it is unfortunate that DER has taken it upon itself to interpret the applicability of the automatic stay and removal provisions of the Code to its action at bar. Its mistaken conclusion that it is immune from the restrictions set forth in the Bankruptcy Code is an unfortunate display of bureaucratic arrogance. As stated by the Third Circuit in *In re Bildisco*, 682 F.2d 72 (3rd Cir. 1982) ". . . we will not enforce a (National Labor Relations) Board order that cavalierly refuses to recognize an outstanding federal court order directly relating to the proceedings before it." (p. 23)

Given the obvious insolvency of the debtor, DER's pursuit of its action in state court subsequent to its receipt of the removal petition has resulted in the Commonwealth Court's entry of a meaningless order. Unfortunately, DER has sought to accomplish indirectly what it is obviously not permitted to do directly. The result has been a regrettable waste of judicial time.

Based on the foregoing, the Court concludes that DER's action is subject to both the provisions of the automatic stay as set forth in 11 U.S.C. § 362, and the removal provisions as set forth in 28 U.S.C. 1478. Accordingly, DER is permanently enjoined from enforcing the order of the Commonwealth Court of Pennsylvania entered against Penn Terra Limited and Margaret L. McArdle, trustee, on May 24, 1982. Further, on the basis of its contumelious conduct, the Court imposes a fine against DER in the amount of $2,500. (Twenty-five hundred dollars). The court further awards counsel fees in the amount of $150. (One hundred fifty dollars) to T. Lawrence Palmer, attorney for the debtor and $50. (Fifty dollars) to Margaret L. McArdle, trustee.

Appropriate orders will be entered.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,

Defendants

ORDER OF COURT

At Pittsburgh in said district this 4th day of November, 1982

It is hereby ORDERED and DECREED that the Department of Environmental Resources, Commonwealth of Pennsylvania, is permanently enjoined from enforcing the order of the Commonwealth Court of Pennsylvania entered against Penn Terra Limited ad Margaret L. McArdle, trustee, on May 24, 1982 at No. 838 C.D. 1982.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,
Defendants

JUDGMENT

At Pittsburgh in said district this 4th day of November, 1982

Judgement is hereby entered against the Department of Environmental Resources, Commonwealth of Pennsylvania, in the amount of Twenty-Five Hundred ($2,500.00) Dollars, payable to the Clerk, U.S. Bankruptcy Court for the Western District of Pennsylvania.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,
Defendants

JUDGMENT

At Pittsburgh in said district this 4th day of November, 1982

Judgement is hereby entered against the Department of Environmental Resources, Commonwealth of Pennsylvania, and in favor of T. Lawrence Palmer, attorney for the debtor, in the amount of One Hundred Fifty ($150.00) Dollars.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-845

Chapter 7

IN THE MATTER OF: PENN TERRA LIMITED, a corporation, also known as PENN COAL COMPANY, a division of PENN TERRA LIMITED,

Debtor

PENN TERRA LIMITED,

Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA,
PATTI J. SAUNDERS & DIANA J. STARES,
Defendants

JUDGMENT

At Pittsburgh in said district this 4th day of November, 1982

Judgement is hereby entered against the Department of Environmental Resources, Commonwealth of Pennsylvania, and in favor of Margaret L. McArdle, trustee, in the amount of Fifty ($50.00) Dollars.

/s/ Gerald K. Gibson
GERALD K. GIBSON
Bankruptcy Judge

cc: Dennis W. Strain, Esq.
T. Lawrence Palmer, Esq.
Margaret L. McArdle, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 81-299-D

UNITED STATES OF AMERICA, ET AL.

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL.

ORDER

This environmental litigation was commenced in this court by the plaintiff United States of America, which has been subsequently joined in invervention by the State of New Hampshire. Contending that health and environment have been endangered by the disposal of certain asbestos wastes, plaintiff seeks relief pursuant to § 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 ("RCRA"), and § 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9606(a) ("CERCLA"). The relief sought by New Hampshire is grounded in provisions of its Solid Waste Management Act, RSA 147:45, *et seq.* ("SWMA"), and Hazardous Waste Management Act, RSA 147-A (Supp. 1981) ("HWMA").[1]

Defendant Johns-Manville Sales Corporation ("Manville"), described as a Delaware corporation which is registered to do business in New Hampshire, is alleged to have disposed of the wastes at issue as the result of its production facility in Nashua, New Hampshire. The individual defendants[2] are described as owners of the sites

---

[1] New Hampshire also claims the right to recovery under the doctrine of common law nuisance.

[2] The individual defendants are: Anthony Matarazzo and Rose Matarazzo; Arthur Bursey, Jr.; Thomas Baker; Stanley Alukonis and Sophie Alukonis; Richard Lannan and Brenda Lannan; James Choate and Joyce Choate; and Joseph Lemieux and Marie Lemieux.

in Hudson, New Hampshire, upon or in which Manville allegedly disposed of its asbestos waste. The initial complaint was filed here in June of 1981 by the United States, and subsequently New Hampshire was permitted to intervene, various cross claims were filed among the defendants, and United States was allowed to amend its complaint,[3] following which it sought to move for a preliminary injunction.

As has been well publicized, however, Manville sought relief from its creditors pursuant to the 1978 Bankruptcy Code by filing a voluntary petition, 11 U.S.C. § 301, for reorganization under Chapter XI of said Act, 11 U.S.C. § 1101, *et seq.* On August 26, 1982, the Bankruptcy Court in the Southern District of New York issued a broad restraining order[4] purporting to stay all persons and governmental units, including the plaintiffs and defendants, from commencing or continuing with any litigation against Manville. Accordingly, under date of September 30, 1982, the Magistrate in this district ordered that further proceedings herein be stayed pending the outcome of the bankruptcy proceedings.

The matter is currently before the Court on the motion of the United States, joined by New Hampshire and defendants Matarazzo, seeking vacation of the aforesaid stay issued by the Magistrate. Manville and certain of the defendants object to the vacation of said stay.[5]

---

[3] The amendment, granted on April 6, 1982, allowed the addition of the claim pursuant to CERCLA, 42 U.S.C. § 9606(a).

[4] A copy of the restraining order issued by the Bankruptcy Court for the Southern District of New York was attached to the legal memo filed in behalf of Manville herein.

[5] Defendants Baker and Alukonis have joined in Manville's objection to the vacation of stay. Although certain of the parties have requested further hearing, the Court finds upon examination of the well-crafted memos filed in behalf of the primary parties and its own research that such hearing is not necessary and proceeds forthwith to resolution of the issues raised.

The thrust of the request for relief from the stay herein is to the effect that the relief here sought falls within the specific exception to 11 U.S.C. § 362(a)(1),[6] which is detailed in 11 U.S.C. § 362(b)(4) as follows:

> The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
>
> . . . .
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's *police or regulatory power* [emphasis added].

Movants urge that inasmuch as the relief here sought is injunctive under federal and state laws which authorize abatement of imminent and substantial endangerment to health caused by the disposal of hazardous asbestos wastes, this Court must vacate the stay for protection of the public. For reasons unclear,[7] neither the United States nor New Hampshire has sought to make use of its own funds for the purpose of emergency clean-up, removal, and containment action pursuant to section 104 and 107 of CERCLA, 42 U.S.C. §§ 9604, 9607, and New

---

[6] 11 U.S.C. § 362(a)(1) provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

[7] It may well be that the respective government plaintiffs feel that the funds available to them are inadequate to provide the relief actually sought herein and that they must accordingly seek to press the instant action against Manville. *See United States* v. *Wade*, 546 F. Supp. 785, 792-94 and n. 22 (E.D. Pa. 1982).

Hampshire's Hazardous Waste Cleanup Fund, RSA 147-B (Supp. 1981) ("HWCF"). Manville argues that as the actual relief here sought is not the injunction of ongoing waste disposal on its part but is the expenditure of funds to rectify what it depicts as long-past disposal practices, the limited relief from bankruptcy stay outlined in 11 U.S.C. § 362(b)(4) should not be here applied.

We commence our analysis with review of the relief sought at pp. 8, *et seq.*, of the amended complaint in behalf of the United States, Document 59. While it is true that movants seek injunction against the allowance or causation of disposal of any asbestos or other hazardous wastes or substances at the sites owned by the individual defendants and also request injunctive relief from the allowance or causing of the alteration of any part of the aforesaid sites without the approval of the Environmental Protection Agency ("EPA"), ¶¶ A and B, a fair reading of the remainder of the relief sought demonstrates that if found to be required, its implementation would require the exepnditure of substantial funds on the part of Manville. Thus it is sought to require Manville to prepare and implement a plan to be approved by EPA for covering all of the sites at issue with soil and vegetation and to maintain such cover in order to prevent asbestos fibers from becoming airborne, ¶ C, and to erect fences and post warnings around each of the aforesaid sites, ¶ D(1-4).[8] Additionally, plaintiffs here

[8] In the course of ordinary trial preparation prior to entry of the stay herein, defendants Matarazzo's disclosure of experts pursuant to the applicable provisions of Rule 26(b)(4), Fed. R. Civ.P., Document 110, has attached to it an estimate by an expert environmental witness which purports to demonstrate that the cost of removal and cover of the waste on the Matarazzo site alone would exceed $1 million. While establishment of any such amount would naturally require proof adduced in accord with proper trial procedure, such estimate is here referred to merely to illustrate that if the plaintiffs herein are successful in the relief sought, substantial sums of money will be required to implement such relief.

seek to require Manville to post a performance bond for the accomplishment of all necessary remedial actions.

From the foregoing it can be seen that regardless of its description the relief here sought actually seeks the expenditure of substantial funds from the assets of Manville which are now within the jurisdiction of the Bankruptcy Court for the Southern District of New York.[9] And although the plaintiffs could easily seek to sever and proceed with their claims against the defendants[10] who are allegedly the owners in possession of the premises upon which threatened imminent danger exists, no such suggestion is here made.[11]

The legislative history of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, is substantially detailed in 1978 U.S. Code Cong. & Ad. News, commencing at p. 5787. Referring respectively and selectively to identical

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[9] At this point, the Court notes that even though it undoubtedly possesses jurisdiction to review the issuance of the stay by its Magistrate pursuant to the provisions of 28 U.S.C. § 636, even were such relief to be afforded, it might well prove illusory, for it is the bankruptcy judge "who is the most knowledgeable about the debtor's affairs, and about the effect that any judicial proceeding would have on the debtor's reorganization" and who ultimately, therefore, retains the jurisdiction of determining whether an action against the debtor may proceed or whether the bankruptcy court's stay should remain in effect. *Association of St. Croix Condominium Owners* v. *St. Croix Hotel Corporation*, 682 F.2d 446, 448 (3d Cir. 1982).

[10] It is well established that the commencement of Chapter XI proceedings with resulting stay as against the debtor therein does not serve to stay proceedings against codefendants who are not themselves seeking the relief of bankruptcy. *Royal Truck & Trailer* v. *Armadora Maritime Salvadorena, et al.*, 10 B.R. 488 (Bkrtcy. N.D. Ill. 1981).

[11] Indeed, the relief herein sought as against the individual defendants appears to be limited to requiring them to note on their deeds the existence of the hazardous waste on their premises and to permit inspection of said premises for testing and monitoring purposes.

provisions set forth in both the Senate, *id.* at 5838, and the House, *id.* at 6299, Reports, the plaintiffs stress that it is obvious that this case is one in which automatic stay is not applicable. Such argument overlooks the requirement that 11 U.S.C. § 362(b)(4) must of necessity be read in conjunction with 11 U.S.C. § 362(b)(5), which excepts from the automatic stay "of the enforcement of a judgment, *other than a money judgment*, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power". Thus, the identical, language in the Senate and House Reports which immediately follows that relied on by the plaintiffs herein states:

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

1978 U.S. Code Cong. & Ad. News, at 5838, *id.* at 6299.

Additionally, the legislative leaders who presented the Bankruptcy Code, i.e., Representative Edwards and Senator DeConcini, made clear that the application of 11 U.S.C. § 362(b)(4) "is intended to be given narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate". 1978 U.S. Code Cong. & Ad. News, at 6444-45 (remarks of Representative Edwards), and at 6513 (remarks of Senator DeConcini). Such remarks merely restate the well-established rule of law to the ef-

fect that "[a] plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money". *Jaffee* v. *United States*, 592 F.2d 712, 715 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979), *quoted in United States* v. *Price*, 523 F. Supp. 1055, 1067 (D.N.J. 1981) (holding under RCRA and CERCLA plaintiff not entitled to preliminary injunction which would require past and current owners of landfill to fund study to monitor extent of problem posed by leachate emanating from landfill, to devise solution to such problem, or to provide alternate water supply to those home owners whose wells were contaminated by such leachate).

The Court does not find persuasive the case authority relied upon by the movants herein. *In the Matter of Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979), concerns circumstances where an authorized administrative agency which had been upheld by a local court had entered a cease and desist order foreclosing the continued operation of the debtor's quarry as violative of the Federal Clean Air Act, 42 U.S.C. § 7401, *et seq.* Subsequent to such administrative and judicial proceedings, the debtor sought relief under Chapter XI of the 1898 Bankruptcy Act, and the bankruptcy court authorized the debtor's continued operation of its quarry. In reversing the bankruptcy court, the district court predicted in dicta that 11 U.S.C. § 362(b)(4) would mandate exception to any stay. In the course of that portion of its opinion, however, the court quoted language which referred to the "narrow construction" which was to be given 11 U.S.C. § 362(b)(4). 466 F. Supp. at 1340.

In Re Mansfield Tire and Rubber Company, 660 F.2d 1108 (6th Cir. 1981), held that a bankruptcy court could not stay the administration by the State of Ohio of its workers' compensation claims, but in the course of so doing pointed out that the "insurance fund, not the debtor's estate, pays the claims for which the employer has paid the premium". 660 F.2d at 1113. In a subse-

quent decision, the Sixth Circuit explained its decision in the *Mansfield* case, in pertinent part, as follows:

> The debtor in *Mansfield* was not subject to making payments on its workers' claims that would resemble a money judgment, since payment of claims would come from premium funds already deposited by the debtor with the state, upon which the debtor had no legal claim. Accordingly, the exception to the automatic stay was applicable in that case, because enforcement of a money judgment liability was not imposed upon the debtor, and the administration of the claims was pursuant to Ohio's police power.

In re Kovacs, 681 F.2d, 454, 456 (6th Cir. 1982).

The decision in *Commonwealth of Pennsylvania, Department of Environmental Resources* v. *Peggs Run Coal*, 423 A.2d 765 (Pa. Commw. 1980), involved a complaint seeking injunctive relief and the posting of bonds as against an ongoing mining operation which was purportedly in violation of certain state environmental laws. The Court held that such action was not automatically stayed by the commencement of bankruptcy proceedings and was within the exception of 11 U.S.C. § 362(b)(4) and (5).[12] *NLRB* v. *Evans Plumbing Company*, 639 F.2d 291 (5th Cir. 1981), held that an enforcement proceeding of an NLRB order reinstating two employees with back pay was excepted from bankruptcy stay pursuant to 11 U.S.C. § 362(b)(4), as such action sought enforcement of federal labor laws regulating the relationship between employer and employee.

SEC v. *First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981), held that the appointment of a receiver

---

[12] More recently, the highest state court in New Jersey has held that an action to fix damages for violation of Medicaid fraud statutes is not automatically stayed by the filing of a petition for bankruptcy in behalf of the errant physician. *In Re Garay*, 89 N.J. 104, 444 A.2d 1107 (1982).

for a securities dealer against which involuntary bankruptcy had been filed was not precluded by the bankruptcy stay as such appointment serves "to prevent dismemberment of the corporate estate by management personnel who have been found to have acted fraudulently and who could otherwise easily dispose of the assets to the detriment of the debtor's creditors. 645 F.2d at 439. And *In Re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248 (9th Cir. 1979), another case brought under the 1898 Bankruptcy Act, held that the regulatory proceedings of the NLRB with reference to unfair labor practices involving two employees of the debtor could not be stayed in bankruptcy.

Were the circumstances of the instant case such that the relief sought was an injunction which would require Manville to cease and desist from ongoing deposit of asbestos wastes on real property sites in New Hampshire, together with the additional posting of a modest performance bond to ensure compliance with such order, this Court would agree that the above-cited cases relied on by movants would indicate that such relief should not be stayed under 11 U.S.C. § 362(b)(4). Unfortunately, this is not such a case. The circumstances herein depict federal and state governments which are either unable or unwilling to take the necessary financial steps to protect the public from what are long extant but apparently recently discovered dump sites containing hazardous wastes, and the same plaintiffs are similarly unwilling to proceed against the current owners who are in possession of such sites. Clearly the relief sought is directed against Manville alone and will require it to divert substantial of its assets now held in the jurisdiction of a bankruptcy court from the claims of numerous creditors, many of whom allege that they are themselves suffering serious physical debilitation as a result of the inhalation of asbestos fibers. Cast in this light, it is clear to this Court that the exception from stay detailed in 11 U.S.C. § 362(b)(4) is not here applicable.

Instructive in this regard is the opinion of the Sixth Circuit in *In Re Kovacs, supra.* There the defendant and certain entities controlled by him were engaged in the business of industrial waste disposal and had been ordered by a state court to cease and desist operations and to remove all industrial wastes from their business premises. On the failure of defendant to do so, the state sought appointment of a receiver over his business assets. Defendant filed in bankruptcy and subsequently sought to restrain in the bankruptcy court proceedings in the state court directed toward inquiry into defendant's current assets and employment. On appeal of the stay issued by the bankruptcy court, the Court of Appeals in affirming such stay said in pertinent part:

> We concur with the bankruptcy court's conclusion that § 362 indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, but to deny those units the power to collect money in their enforcement efforts. We further concur with the conclusion of the bankruptcy court and the district court that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the monetary stay. We note that the state court's order appointing a receiver also ordered that Kovacs turn over all his non-exempt assets to the receiver, and authorized the receiver to collect any sums of money that would become payable to Kovacs in the future. There is very little in substance to distinguish that order and a money judgment.

Id. at 456.

As has been elsewhere stated, the term "police or regulatory power" contained in 11 U.S.C. § 362(b)(4) has reference to the enforcement of laws "affecting

health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court". *State of Missouri* v. *United States Bankruptcy Court, et al*, 647 F.2d 769, 776 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 1035 (1982) (state grain warehouse laws, although regulatory in nature, held to primarily relate to the protection of the pecuniary interest in the debtor's property and not to matters of public health and safety).

In sum, while plaintiffs herein could choose to amend their pleadings and proceed pursuant to sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604, 9607, proceed immediately with government funds to clean up the hazards which they depict to be existing at the waste sites described, and then seek reimbursement from Manville pending resolution of the bankruptcy proceedings, they have not chosen to do so.[13] In lieu of such proceedings, they suggest that this Court may wrest from the bankruptcy jurisdiction the substantial assets which would be required were the relief here sought to be ordered after trial.[14]

This Court has no such jurisdiction, and it should be noted that nothing in this Order seeks to prevent any party in interest herein from seeking relief from the stay of the bankruptcy court by proper application to such court. The Court finds and rules, however, that in entering its Order of September 30, 1982, the Magistrate acted properly, and that the motion to vacate his stay

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[13] This was the procedure followed in *City of Philadelphit* v. *Stepan Chemical Company*, 544 F. Supp. 1135 (E.D. Pa. 1982), where the City expended its own funds to clean up the hazardous wastes which had been illegally dumped by others and then sought to recoup such under § 107 of CERCLA.

[14] *See United States* v. *Reilly Tar & Chemical Corporation*, 546 F. Supp. 1100 (D. Minn. 1982), for detailed indication of activities which might be taken against solvent past disposers of hazardous wastes.

in the instant proceedings must be and it is herewith denied.

SO ORDERED.

/s/ [Illegible]
Chief Judge
United States District Court

November 15, 1982
cc: All Counsel

Office - Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-815

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OHIO, PETITIONER

v.

WILLIAM LEE KOVACS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
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In the Supreme Court of the United States

OCTOBER TERM, 1982

82-815

STATE OF OHIO, PETITIONER

v.

WILLIAM LEE KOVACS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

INTEREST OF THE UNITED STATES

This case presents the substantial question whether the automatic stay provisions of the Bankruptcy Reform Act, 11 U.S.C. 362, operate to block the effective implementation of mandatory injunctions obtained in governmental environmental suits against defendants who later file for bankruptcy. Here, an industrial waste disposer successfully invoked the automatic stay to prevent the State of Ohio from enforcing a state court order requiring the polluter, who had failed to comply with an earlier cleanup order, to release certain of his assets and future in-

come to a court-appointed receiver who, in turn, was directed to effect the cleanup. That problem equally arises when the United States seeks to enforce cleanup obligations imposed by federal law, including the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300f *et seq.*, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.*

We have cause for concern that the decision below may be used to cripple our own environmental enforcement efforts. Already, Kovacs himself has invoked the Sixth Circuit decision to frustrate a federal action pending against him. At least one district court has refused to vacate a stay against an ongoing federal action in pursuit of an injunction that would order the defendant-debtor to abate the health hazard created by its disposal of asbestos wastes. *United States* v. *Johns-Manville Sales Corp.*, Bankr. No. 81-299-D (D.N.H. Nov. 15, 1982).[1] Furthermore, even as it bears on local enforcement efforts, the present decision implicates the national commitment to a safer environment by encouraging offenders to file for bankruptcy and thereby excuse themselves from performing orders which require them to abate the health hazards they have created.

STATEMENT

1. Prior to filing a petition in bankruptcy, the debtor, William Kovacs, had been engaged in the business of industrial waste disposal in Ohio. In 1979 the State of Ohio sued Kovacs as an individual

[1] See also *In re Penn Terra Limited*, Bankr. No. 82-845 (W.D. Pa. Nov. 4, 1982).

and as the officer of several business entities, including the Chem-Dyne Corporation, for alleged violations of various state environmental laws. At that time, Kovacs signed a stipulation and judgment entry in the Butler County Common Pleas Court. That order prohibited him from causing further pollution, required him to remove all hazardous wastes from the premises of the Chem-Dyne Corporation by July 1980, and directed him to pay $75,000 to the Ohio Department of Natural Resources. Pet. App. G. Due to Kovacs' failure to comply, the state court appointed a receiver to collect Kovacs' non-exempt assets and use them to finance the cost of cleanup at the Chem-Dyne site.[2] Pet. App. E. Subsequently in July 1980, Kovacs filed a personal petition in bankruptcy in the United States Bankruptcy Court for the Southern District of Ohio. *In re Kovacs*, Bankr. No. B-1-80-1499 (Oct. 31, 1980).[3]

In an effort to ensure the availability of adequate funds to implement the cleanup order, Ohio sought a state court hearing on Kovacs' current employment status and income. Kovacs thereupon moved the bankruptcy court to enjoin Ohio from proceeding in state court. He argued that the State's goal was to obtain an order permitting the state-court receiver to use his post-bankruptcy income to satisfy the unfilled

---

[2] The receiver was authorized "to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable." Pet. App. E at 9.

[3] His original petition sought reorganization under Chapter 11 of the Bankruptcy Code. In September 1980, the bankruptcy court converted the action to one for straight bankruptcy under Chapter 7 of the Code. See Pet. App. D at 1.

obligation to clean up the Chem-Dyne site and that such an order would violate the automatic stay provisions of 11 U.S.C. 362. The bankruptcy court agreed.

2. The bankruptcy court readily acknowledged that neither the cleanup order nor the order imposing the receivership gave the State a money judgment with respect to cleaning up the Chem-Dyne premises.[4] Nonetheless, the bankruptcy court enjoined the State from proceeding in state court "to levy on post-filing wages of the debtor." Pet. App. D at 11. It reasoned that "there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him. We hold, therefore, that the State is estopped to deny that it is seeking to enforce a money judgment against debtor." Pet. App. D at 6.

The State appealed to the United States District Court for the Southern District of Ohio, which affirmed. Pet. App. C. The district court, too, found that the State sought to collect money "just as though it were enforcing a money judgment." Pet. App. C at 3. Accordingly, the district court held the automatic stay applicable "because the state's effort is clearly to enforce a judgment obtained before the filing of the bankruptcy petition." *Ibid.* Moreover, the district court rebuked the State for "attempting to punish Mr. Kovacs for not complying with the 1979 judgment, and, in the process, subverting the purpose of the Bankruptcy Code." *Id.* at 4. The court admonished the State to seek relief from the stay in the bankruptcy court under 11 U.S.C. 362(d). Meanwhile, if Kovacs were violating envi-

---

[4] The State apparently conceded that it could not enforce that part of the 1979 order requiring Kovacs to pay the State $75,000. Pet. 2n.*

ronmental laws, the State could invoke criminal sanctions, but the "Bankruptcy Code may not be used as a substitute for such criminal sanctions." *Ibid.*

3. The Sixth Circuit affirmed, *per curiam*. 681 F.2d 454 (1982) (reproduced at Pet. App. A). It concluded that, while Section 362(b) clearly permitted governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, it denied them the power to collect money in their enforcement efforts. Pet. App. A at 6. Like the two lower courts, the Sixth Circuit also believed that Ohio had returned to state court in pursuit of what "in essence" amounted to a money judgment against Kovacs, which was "properly" subject to the automatic stay. *Ibid.* Concerned that the state court had ordered Kovacs to release all non-exempt assets, including money payable to himself in the future, the Sixth Circuit could find "little in substance to distinguish that order and a money judgment." *Id.* at 6-7. It concluded that Ohio's attempt to reach Kovacs' post-bankruptcy earnings would "subvert" the purpose of the Bankruptcy Code to rehabilitate debtors. *Id.* at 7.

DISCUSSION

The Sixth Circuit's decision effectively defeated Ohio's ability to force Kovacs to comply with a mandatory injunction designed to protect public safety. At least in principle, that holding conflicts with decisions of other courts, including the Court of Appeals for the Fifth Circuit. By propounding an expansive definition of "money judgment," the court has unduly restricted the governmental exemption to the automatic stay. See 11 U.S.C. 362(b)(5). The result is to encourage polluters to abuse the Bankruptcy

Code and defy state and federal environmental protection laws. Accordingly, we join Ohio in urging the Court to review this important question.

1. So far as relevant here, governmental litigation is wholly or partially exempt from the automatic stay provision of the Bankruptcy Act when the suit implements the government's police or regulatory power. For purposes of 11 U.S.C. 362(b)(4), it matters not what relief is sought: the governmental unit may commence or continue any police or regulatory action. Subsection (b)(5), on the other hand, specifies which judgments the government may not then seek to execute. In the present case, there is no doubt that the order was obtained pursuant to an exercise of Ohio's police or regulatory powers. The legislative history is unambiguous that the automatic stay provisions do not apply to halt the commencement and continuation of environmental protection actions.[5] The only question is whether the state court order sought to be enforced is a "money judgment" which cannot be executed without leave from the bankruptcy court.[6]

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[5] H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 343 (1978):

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. [Emphasis added.]

See also S. Rep. No. 95-989, 95th Cong., 2d Sess. 52 (1978).

[6] Once a petition in bankruptcy is filed, the bankruptcy court acquires exclusive jurisdiction over the debtor's property, wherever it may be located. 28 U.S.C. 1471(e).

Neither the Bankruptcy Code nor its legislative history specifically defines the term "money judgment." Congress did, however, explain that subsection (b)(5) excluded money judgments from the governmental exemption in order to prevent the government from receiving preferential treatment at the expense of the other creditors.[7] Obviously, when the government's interest in executing a judgment is strictly pecuniary, then its interest is identical to that of other creditors. The government's interest would be predominantly pecuniary, for example, when it seeks to collect a penalty or fine imposed upon the debtor for a statutory violation. In that case, there is no justification for granting the government preferential treatment.[8] By the same token, when the thrust of the government's action is not to collect money from the debtor but rather to protect the public health and safety, then the government does not stand in the shoes of an ordinary creditor. In applying the exemption to a given judgment, the court must initially scrutinize the governmental interest. The mere fact that the judgment

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[7] H.R. Rep. No. 95-595, *supra*, at 343:

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

See also S. Rep. No. 95-989, *supra*, at 52.

[8] A governmental penalty or fine may, however, survive the bankruptcy discharge under 11 U.S.C. 523(a)(7).

entails the expenditure of money does not automatically remove it from the (b)(5) exemption.[9]

2. Many injunctions entail the expenditure of money for their performance. See *United States* v. *Charles Price*, 688 F.2d 204, 213 (3d Cir. 1982).[10] A defendant may be ordered to fund a study to determine the extent of the threat posed by its waste disposal practices, *e.g.*, *Price;* to remove leaking drums of toxic wastes that threaten groundwater contamination, *e.g.*, *Kovacs;* to remove industrial wastes previously deposited in navigable waters, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-493 (1960); to operate its plant in compliance with environmental regulations, *e.g.*, *Commonwealth* v. *Peggs Run Coal*, 423 A.2d 765 (Commw. Ct. Pa. 1980). In each case, when the government seeks to enforce the order, its foremost aim is to protect the public health, not to enhance the public fisc.

In the *Price* case, the Third Circuit faulted the district court for adopting an unduly restrictive view

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[9] The Code defines "claim" as the "right to payment, whether * * * liquidated [or] unliquidated, * * * legal [or] equitable * * *." 11 U.S.C. 101(4)(A). The fact that this definition is broad does not mean that money judgments necessarily include the "equitable" right to payment. Even if it did, the relief Ohio sought did not constitute a "money judgment" excluded from the Section (b)(5) exemption; for, Ohio's claim was not to be paid but to require that Kovacs spend whatever amount was necessary to remove the hazardous wastes.

[10] See *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 290-291 (1960) (when the public interest is involved, a court may fashion any necessary, equitable relief, including the payment of money); *Porter* v. *Warner Co.*, 328 U.S. 395 (1946) (exercising its equitable jurisdiction, this Court ordered defendants to repay illegally collected rents under the Emergency Price Control Act).

of its equitable remedial powers in the context of environmental protection. 688 F.2d at 211. The federal government had requested funds to conduct a diagnostic study of the threat posed by a hazardous waste landfill. The district court denied the request, believing it an attempt to transform a claim for damages into an equitable action. The Third Circuit disagreed (*id.* at 212):

> Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss. A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury, i.e., the contamination of Atlantic City's water supply.[11]

Similarly, in the present case, the state court's orders were preventive, not compensatory. Initially, the court ordered Kovacs himself to clean up the dumpsite. Only subsequently, upon the State's showing that Kovacs had not complied, did the court order Kovacs to release certain assets and future earnings to the court-appointed receiver. Although this latter order directed the payment of money by Kovacs to the receiver, the receivership was established for the

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[11] For other reasons, the Third Circuit was unable to find that the district court had abused its discretion in denying the preliminary injunction. 688 F.2d at 214.

limited purpose of implementing the cleanup order. Accordingly, this second order, directed to cleanup of the dumpsite, must be distinguished from a traditional money judgment.[12]

Remedial orders obtained under the endangerment provisions may require the expenditure of money either directly or indirectly. Nevertheless, such remedial orders are not designed to penalize defendants. Nor is their objective to compensate the government for harm or expenses incurred. They aim solely for public protection and effective enforcement of the environmental laws. As such, the government's efforts to enforce compliance should be exempt from the operation of the automatic stay provisions.

3. The decision below is at odds with the approach followed by the Fifth Circuit when it upheld an NLRB order that a bankrupt company reinstate two employees whom it had discriminatorily discharged. *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (per curiam). Unconcerned by the fact that a reinstatement order was tantamount to an order to commence paying wages, the court ruled that: "The crucial issue is whether the NLRB is a governmental unit and whether this action is one to enforce police or regulatory powers." 639 F.2d at 293.[13]

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[12] "A money judgment is one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be transferred or restored. 2 Bouv. Law Dict. p. 2240." *U.S. Fidelity & Guaranty Co.* v. *Ft. Misery Highway Dist.*, 22 F.2d 369, 372 (9th Cir. 1927).

[13] The court declined to express an opinion as to whether the award of back pay was a money judgment or whether the bankruptcy court had the power to issue a discretionary stay under 11 U.S.C. 105(a), notwithstanding the exemption

Similarly, in a case closely analogous to *Kovacs* on its facts, the Commonwealth Court of Pennsylvania found the governmental action exempt from the stay. *Commonwealth* v. *Peggs Run Coal Co.*, 423 A.2d 765 (Commw. Ct. Pa. 1980). There, the Pennsylvania Department of Environmental Resources sued the owner of a coal mine and cleaning plant for alleged violations of various state environmental statutes. The complaint requested both a mandatory injunction ordering compliance with the laws and the posting of bonds to assure compliance with the injunction. The coal company, having filed a petition in bankruptcy, invoked the automatic stay provisions of the Bankruptcy Code to block the agency's action. After analyzing the legislative history (quoted at notes 5, 7, *supra*), the Pennsylvania court concluded that the agency was not attempting to enforce a money judgment. The court therefore held the proceeding exempt from the automatic stay.[14] 423 A.2d at 767.

Plainly enough, the Sixth Circuit followed a different path. It focused its attention exclusively on the ordered release of Kovacs' post-bankruptcy earnings to the receiver, ignoring the fact that the receivership was limited to cleaning up the dumpsite to protect public safety. In this, we submit, the court below fell into error.

4. The importance of the question is obvious. Automatic application of the stay to enforcement of orders like that involved here elevates the Bank-

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of the NLRB's action from the automatic stay. 639 F.2d at 293 & n.3.

[14] See also, *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D. P.R. 1979) (vacating bankruptcy court order that stayed enforcement of Clean Air Act regulations against debtor's quarry operations).

ruptcy Code over federal and state health safety laws, thus permitting and encouraging bankruptcy as an escape from the costs of environmental protection. Because of the great number of dumpsites urgently requiring cleanup and the limited funds available to state and federal governments for the purpose, any rule that insulates the responsible polluter has grave consequences.

The dimensions of the problem and the need for reasonably prompt solutions argue for clarification of the governing law by this Court without delay. In the circumstances, we urge the Court to review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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